No. 3013

IN THE

# United States Circuit Court of Appeals

*For the Ninth Judicial Circuit.*

LUMBERMEN'S TRUST COMPANY, Trustee,
*Appellant,*

vs.

TITLE INSURANCE & INVESTMENT COMPANY OF TACOMA, a corporation, COMMONWEALTH TITLE TRUST COMPANY, a corporation, HORACE FOGG, FRED S. FOGG, HERBERT GOVE AND ALVA FOGG, administratrix of the estate of FRANKLIN FOGG, deceased,
*Appellees.*



*Upon Appeal From the United States District Court For the Western District of the State of Washington.*

## BRIEF OF APPELLEES

CHARLES O. BATES,
CHARLES T. PETERSON,
EDWARD FOGG,
*For Appellees.*

FRANK H. KELLEY, JOHN H. HALL,
ROBERT M. DAVIS, FRANK C. NEAL,
*For Appellants.*

Puyallup Valley Tribune

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## BRIEF OF APPELLEES

### STATEMENT OF CASE

Appellant's statement of the case falls so short of being a complete statement of the issues, that we feel called upon to make a more complete state-

ment that the Court may at the outset have all of the issues of the case before it.

This action was brought in the United States District Court for the Western District of Washington, Southern Division, by the Lumbermen's Trust Company, an Oregon corporation, against Title Insurance & Investment Company of Tacoma, a Washington corporation (hereinafter called T. I. & I. Company of Tacoma), Commonwealth Title Trust Company, a Washington corporation (hereinafter called Commonwealth Company), Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove (hereinafter called the Foggs and Gove); the object was to recover a judgment against T. I. & I. Company of Tacoma for Eighty Thousand Dollars and interest, and for a decree of foreclosure and sale of the property pledged to secure said indebtedness, as set forth in the chattel mortgage attached to the complaint marked Exhibit "A." (Record, p. 21.)

Second: For a judgment against the defendant Commonwealth Company on an instrument of guaranty, attached to the complaint marked Exhibit "B" (Record, p. 25), and for a decree of foreclosure of the mortgage given to secure said guaranty, which mortgage is attached to the complaint marked Exhibit "C" (Record, p. 30), and a prayer for alternative relief that if for any reason the agreements and undertakings of the Commonwealth Company be found by the Court to be not valid,

then the plaintiff have judgment against the defendants Foggs and Gove for such sum as may be found by the Court to be due upon the guaranty of the Commonwealth Company, and also for costs and disbursements, including an attorney fee of Ten Thousand Dollars (See Amended Bill of Complaint, Record, p. 2.)

Exhibit "A" was a chattel mortgage executed December 2nd, 1911, upon the abstract plant of the T. I. & I. Company of Tacoma, which property was, at the time of the execution of the mortgage, being used in the abstract business in Pierce County, Washington, by said T. I. & I. Company of Tacoma, and embraced simply property in Pierce County. That mortgage provided in Paragraph 2 that said abstract plant should be shipped to the City of Portland, Oregon, and there placed in a vault to be there kept under lock and key during the life of the agreements entered into on December 2nd, 1911.

Contemporaneous with the execution of Exhibit "A," and for the purpose of securing the performance thereof, Exhibits "B" and "C" were executed.

The defendants Commonwealth Company and T. I. & I. Company of Tacoma filed separate answers and by stipulation the answer of the Commonwealth Company is to be taken and considered as the answer of the individual defendants Foggs and Gove. The defendants by these answers admit

the execution of Exhibits "A," "B" and "C," attached to the complaint, but deny that there was any valid consideration for the execution of either or any of them.

Defendants as affirmative defenses to the complaint alleged:

(a) That the complaint does not state facts sufficient to constitute a valid cause of action in equity against the defendants, or either of them, nor are the facts stated therein sufficient to entitle plaintiff to any relief against the defendants, or either of them.

(b) That all of said instrumments and agreements set forth in the complaint were, and are, illegal and void, and of no force and effect, for the reason that the sole and only consideration for the execution of the same was for the purpose of removing and restraining rivalry and competition in the abstract business in Pierce County, Washington, and were in restraint of trade and competition, and were for the purpose of giving the defendant Commonwealth Company a monopoly of said business.

(c) That the Commonwealth Company was, and is engaged solely in the business of making and selling abstracts of title to lands in Pierce County, and maintaining an abstract plant in Tacoma in said County and State. That it was not authorized by its articles of incorporation, nor was

it engaged in the business of becoming surety or guarantor for any person, firm or corporation for the contracts, undertakings or obligations of third parties. That Exhibits "B" and "C," attached to the complaint, were made and executed wholly without consideration, and said Commonwealth Company neither directly or indirectly reecived any consideration, or money, or property or labor, or thing of value therefor, or in connection therewith, nor were its assets in any way increased thereby.

(d) The fourth affirmative defense consists of a partial defense as to interest. (See Record p. 35.)

The answer of the defendant T. I. & I. Company of Tacoma was substantially the same as the answer of the defendant Commonwealth Company, but it contained a further partial defense to the cause of action set forth in plaintiff's complaint that said action was prematurely brought as to the defendant T. I. & I. Company. (See answer of defendant T. I. & I. Company, Record pp. 61-74.)

The action was tried before Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, upon an agreed statement of facts (Record, pp. 75-114), and certain oral testimony, and on October 9th, 1916, the Court having heretofore filed its opinion sustaining defendants' contention under their several affirmative answers (Record, pp. 153-184), rendered a judgment and decree in favor of defendants in ac-

cordance with said opinion (Record, pp. 193-202), from which said judgment and decree this appeal is prosecuted by the plaintiff.

## STATEMENT OF FACTS.

The honorable judge of the Lower Court in his opinion made very full findings of fact, and we believe that the same contains a clear, concise and complete statement of the facts at issue in this case, and we therefore adopt it as a statement of facts, subject later in our argument to be supplemented with other facts that appear from the evidence. Said statement is found in the record on pages 156 to 163, and is as follows:

> "This cause was tried by the Court upon stipulation as to the facts."

T. I. & I. Company, of Washington, a corporation of which A. D. Willoughby and O. M. Smith and wife were the sole and only stockholders; Commonwealth Company, of which the Foggs and Gove, and executors of the estate of Charles S. Fogg, deceased, were the sole and only stockholders, and Wilson Title & Abstract Company, a corporation, (hereinafter designated as the Wilson Company) in which R. C. Wilson was substantially the sole stock holder, each maintained, owned and operated in the City of Tacoma, an abstract business, used, and intended to be used, for furnishing abstracts of title of property within Pierce County, Washington.

That during all of said time the said companies had carried on business in active and actual competition with each other, and for many years prior to said date said companies owned and controlled the only abstract plants in said county, and transacted all of the abstract business therein.

That the competition between said companies was very keen, and they were cutting prices.

That for some days prior to December 6, 1909, the Foggs, Willoughby and Smith had been negotiating the sale of the abstract plant of the T. I. & I. Company of Washington to a corporation to be formed.

That during said negotiations, and on the 6th of December, 1909, the Wilson Company executed and delivered to Willoughby, then in the actual management of the T. I. & I. Company of Washington, and Franklin Fogg, then in the management of the Commonwealth Company, a lease and option to purchase the entire plant and business of the Wilson Company.

That on the 7th day of December, 1909, the said Willoughby by written assignment transferred to said Franklin Fogg his interest in said lease and option to purchase, a copy of which is attached to said lease and option. That by said lease it was provided among other things that said abstract plant should remain in the exclusive possession of the Wilson Company, but should not be operated, and

in Paragraph V., it was further provided that said Wilson Company and its officers should not during the life of said lease start, or be interested in any other abstract plant in Pierce County, Washington.

That on the 7th day of December, 1909, the same day that Willoughby assigned his interest in the Wilson lease to Fogg, the T. I. & I. Company of Tacoma was organized, with a capital stock of $5,-000.00, and purchased from the T. I. & I. Company of Washington its abstract plant and business for the sum of One Hundred Thousand Dollars, payable Ten Thousand Dollars in cash, balance of Ninety Thousand Dollars secured by a mortgage upon the plant. Part control in the new company was preserved in the seller and the mortgage given provided that the mortgagor would use its best efforts to enlarge and build up the business. The original stockholders of said T. I. & I. Company of Tacoma were said Willoughby, one A. F. Albertson and F. A. Rice—Willoughby subscribing for forty-eight shares, and the other two for one share each, being the whole of the capitl stock—two of the Foggs idemnified him for his subscription for such shares. That on said day the said Willoughby assigned his stock in blank and delivered it to Fred S. Fogg, and afterwards on the 30th day of December, 1909, the stock certificates in said T. I. & I. Company of Tacoma were surrendered and the same were duly issued to the Foggs and Gove for all of the capital stock of said company, the par value of which said

stock was duly paid by said stockholders to the T. I. & I. Company of Tacoma.

The result of these transactions was to leave the entire abstract business in Pierce County in the hands of the T. I. & I. Company of Tacoma, and the Commonwealth Company, in which two companies the stockholders were substantially the same.

The said mortgage and notes of Niney Thousand Dollars executed by the T. I. & I. Company of Tacoma, to the T. I. & I. Company of Washington for the part purchase of the said abstract plant of the latter company were assigned to the Traders Trust Company of Oregon, an Oregon corporation, and that at all times mentioned in the complaint and answer the said Willoughby and Smith and wife were the officers and sole stockholders of the said Traders Trust Company of Oregon.

The T. I. & I. Company of Tacoma paid to the T. I. & I. Company of Washington the semi-annual interest on its mortgage, due June 7, 1910, amounting to $3,150.00, and a like amount on December 7th, 1910, and also paid the installment of principal of Ten Thousand Dollars, due December 7th, 1910. It also paid $2,800.00, the interest due June 7th, 1911. Said payments amounting in all to $29,-100.00, and on the 7th day of December, 1911, there would become due an interest payment of $2,800.00, and an installment of principal of $5,-000.00.

During the summer of 1911 correspondence took place between Horace Fogg, a stockholder in both the Commonwealth Company and the T. I. & I. Company of Tacoma, and Willoughby, looking towards an adjustment of this mortgage indebtedness.

It is clearly shown from these letters and the other evidence that the T. I. & I. Company of Tacoma could not make this payment of interest and principal about to become due, and that some adjustment would have to be made, or the mortgage would be foreclosed and the plant taken back by the Willoughby and Smith interests, or sold under foreclosure sale to some third party and operated as a competing plant.

On said December 2nd, 1911, said Traders Trust Company of Oregon, being then the owner and holder of said notes and chattel mortgage, dated December 7th, 1909, executed by the said T. I. & I. Company of Tacoma, and said last named company, executed and delivered to each other the pledge agreement, dated December 2nd, 1911, ~~pledged agreement, dated December 2nd, 1911,~~ now sought to be foreclosed, and also the thirty-two notes, to secure which the same was given, all dated December 2nd, 1911, for the principal sum of $2,500.00 each, making an aggregate sum of Eighty Thousand Dollars, the same being payable one note each year on and after December 7th, 1915, with interest thereon at the rate of 5 per cent per annum, payable semi-annually.

At the same time, on December 2nd, 1911, and as a part of the same transaction, said Traders Trust Company cancelled and delivered up to the T. I. & I. Company of Tacoma the notes dated December 7th, 1909, that were executed by said T. I. & I. Company of Tacoma to evidence the deferred payments of the original purchase price of said abstract plant from said T. I. & I. Company of Washington. At the same time, on said December 2nd, 1911, said Commonwealth Company executed and delivered to said Traders Trust Company of Oregon its guaranty agreement dated December 2nd, 1911, guaranteeing payment of the first seven of said thirty-two notes, and guaranteeing payment of the interest on all of said thirty-two notes to and including the interest due December 7th, 1921, and also executed and delivered its real estate mortgage to secure said guaranty agreement, and also a certified copy of the resolution of the stockholders and trustees, of said Commonwealth Company, dated December 2nd, 1911, authorizing the same.

The undersigned, Fred S. Fogg, Herbert H. Gove, Horace Fogg and Franklin Fogg, in consideration of the acceptance of the foregoing guaranty and agreement by the said Traders Trust Company of Oregon, and other valuable considerations, do hereby agree and guarantee to and with the Traders Trust Company of Oregon, that the foregoing guaranty and each and every part thereof, is based

upon a valuable consideration, sufficient in law to bind the Commonwealth Trust Company, and that the same is a valid and subsisting obligation of said Company. This guaranty by these individual defendants appears to have been given because of a question having arisen as to the binding effect of the guaranty and mortgage given by the Commonwealth Company.

Within a day or so after December 2, 1911, said Willoughby and Smith prepared, signed and delivered an agreement not to enter the abstract business in Pierce County, the agreement being in the following words:

"To the Title Insurance & Investment Company of Tacoma, Washington,
Gentlemen:

In consideration of the agreements which have been this day made between you, the Title Insurance & Investment Company of Washington, the Commonwealth Title Trust Company and the Traders Trust Company of Oregon, we, the undersigned individuals, who are the principal stockholders of the Title Insurance & Investment Company of Washington, and also of the Traders Trust Company of Oregon, do hereby covenant and agree that as long as the agreements on your part and on the part of the Commonwealth Title Trust Company and on the part of Fred S. Fogg, Horace Fogg, Frank Fogg, and Herbert H. Gove, are kept and per-

formed, we will not, nor will either of us, directly or indirectly, as individuals, or through the medium of any corporation, transact an abstract business or a title insurance business in Pierce County, State of Washington.

In Witness Whereof, we have hereunto set our hand this 2nd day of December, A. D. 1911.

A. D. WILOUGHBY,
O. M. SMITH."

Although it is disputed that this was a part of the other transactions of December 2nd, 1911, the preponderance of the evidence shows that it was, and so understood. The very fact that the agreement was given the same date, to my mind, shows this. The Commonwealth Company never received any money or property, or labor on account of its execution of said guaranty agreement and real estate mortgage. The only benefits derived by it from the agreement being the extinction of competition that had previously existed—from the operating of the abstract plant by the T. I. & I. Company of Tacoma and the elimination of the risk, upon the collapse of the latter company, of its plant coming in to the possession of hostile interests to be operated in actual competition to the Commonwealth Company.

That immediately after said December 2nd, 1911, said abstract plant was shipped to Portland, Oregon, and placed in a vault, one of the keys of which was held by Traders Trust Company, and the other by

a representative of that company and the T. I. & I. Company of Tacoma, and has remained there ever since, all as provided in said agreements of December 2nd, 1911.

That at the time of the making and execution of said agreement of December 2nd, 1911, all of the abstract business in Pierce County was being transacted by the Commonwealth Company and the T. I. & I. Company of Tacoma, except about ten per cent. Far the major portion of the business transacted by the two companies being transacted by the Commonwealth Company—the 10 per cent. mentioned being transacted by a new company entering the field between 1909 and 1911. At the time of trial the evidence showed that the percentage of business transacted by this new company had materially increased.

In compliance with its said guaranty agreement, dated December 2nd, 1911, said Commonwealth Company duly paid the interest that became due on said thirty-two notes on June 7th, 1912, amounting to $2,000.00, and also the interest that became due on December 7th, 1912, amounting to $2,000.00, and also the interest that became due on June 7th, 1913, amounting to $2,000.00, and the interest that became due on June 7th, 1914, amounting to $2,000.00, making a total sum of $10,000.00 paid by it pursuant to its said guaranty agreement dated December 2nd, 1911.

The abstract business in Pierce County con-

tinued to slump after December 2nd, 1911, and the Commonwealth Company found before December, 1914, that it could not continue to carry on said guaranty agreement without great loss to itself, as on said date not only an interest payment of $2,000.00 was coming due, but also the principal on the first of said thirty-two notes, amounting to $2,500.00 additional. An effort was made to readjust matters between the defendants and complainants, but without success. This suit was begun upon the failure of such negotiation.

## ARGUMENT

### FIRST.

### LIABILITY OF DEFENDANT COMMONWEALTH CO.

(*A*) *Restraint of Trade and Competition and Creation of Monopolies at Common Law.*

The appellee Commonwealth Company insists and maintains that neither the contract of guaranty (plaintiff's Exhibit "B" attached to the complaint (Record, p. 25), nor the real estate mortgage (plaintiff's Exhibit "C," attached to the complaint, Record, p. 30), can be enforced in this action, or any relief granted thereunder, for the reason that the pleadings and documentary evidence show on their face that said contracts were given without any legal consideration, and were given solely for the purpose of removing and restraining trade and rivalry and competition existing in the abstract

business in Pierce County, and for the purpose of inducing the T. I. & I. Company of Washington, Willoughby and Smith and wife, and any other person, or persons, who might become purchaser at foreclosure sale of the plant and business of the T. I. & I. Company of Tacoma to refrain from engaging or entering into the abstract business in competition with the defendant, and for the purpose of giving the defendant Commonwealth Company a monopoly of said business, and was one of several transactions having for their purpose the restraint of trade and competition in the abstract business, and giving the defendant Commonwealth Company a monopoly of said business, all of which said transactions tended to, and did produce such results. This is also sustained by the oral evidence in the case.

The undisputed evidence is, as found by the lower court, that Willoughby and Smith, the real plaintiffs and appellants in this action, aided and abetted in the formation of said monopoly, participated in all of the transactions leading up to the same, and the testimony also shows that the dominant purpose of Willoughby and Smith, and the other parties to said transaction was the suppresing of competition in the abstract business and forming a monopoly in that business.

Contracts in restraint of trade may be divided into three classes:

1st. Where the contract is ancillary to some

lawful act, such as where one person sells his business and goodwill to another he can legally contract that he will not engage in the same business for a reasonable length of time, and covering a reasonable territory, but even this kind of a contract will not be upheld where the restraint is unreasonable either as to time or territory, or where the sale or transaction is one of a series of transactions which have for their purpose the restraint of trade or competition, or the monopolizing of business, or where the necessary result of such transaction will accomplish, or tend to accomplish this purpose.

2nd. Agreements of persons not already engaged in business not to engage in business where there is no sale of business, or other legal consideration. Such agreements are held against public policy, illegal and void.

3rd. Where there is no sale by a person engaged in business, of his good will, an agreement by him to discontinue business is illegal and void.

## I.

It is conceded that a contract in restraint of trade is enforceable where it is ancillary to some lawful contract involving some such relation as vendor or vendee, partnership, employer and employee, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of such fruits by the other party, but where

such contract is not ancillary to some lawful contract, or where such contract is one of many transactions, the purpose of which is to suppress competition, create a monopoly, or is in restraint of trade, they are universally held illegal and non-enforceable.

> *U. S. vs. Addyston Pipe & Steel Co.*, 85 Federal 271-291.

Affirmed by U. S. Supreme Court, 175 U. S. 211. (44th Ed. 136.)

While this is a case under the Sherman Anti-Trust Act the decision is applicable to contracts in restraint of trade generally.

The Sherman Anti-Trust Act is, in reality, an announcement of the common law rule, which maintains in this State concerning contracts in restraint of trade, with some enlarged remedies applicable only to Inter-State commerce.

> *Pocahontas Coke Co. vs. Powhattan Co.*, 56 S. E. 264-268, 10 L. R. A. (N. S.) 281.

This question on all of the three branches above referred to is thoroughly discussed in

> 6 *Ruling Case Law, Sec.* 190 et seq.

The text in these sections in most instances is taken from some adjudicated case, and the cases in the notes fully sustain the text.

"MONOPOLY, CONSOLIDATION OF BUSINESS, VALIDITY OF CONTRACT:

1. Contracts by which a corporation which buys up and consolidates all but a small percentage of the ice manufacturing plants of the city, in order to control the market and suppress competition, requires stockholders of the absorbed plants to refrain from re-engaging in the business for a period of ten years, are void as a restraint of trade, and are within a statute declaring guilty of conspiracy any corporation or individual which shall enter into any contract having for its object the limiting of the quantity of any commodity to be produced, and cannot be enforced by a corporation organized to take over the business, property, and contracts of the one which effected the consolidation.

SAME—FAILURE TO RAISE PRICES—EFFECT.

2. That no effort is made to control, fix, or raise the price of the product of certain plants which have been bought in by one concern to control the market and suppress competition, does not render enforceable a contract by which holders of stock in such concern agreed not to enter into the business within the city for a series of years."

*Merchants Ice & Cold Storage vs. Rohrman,* 30 L. R. A. (N. S.) 973; 128 S. W. 599.

*Lane vs. Leiter*, 237 Fed. 149.

A contract between manufacturers whereby the first party agrees that in consideration of a percentage on the sales made by the second party not to use his plant for the production of strap and T hinges for five years, the contract to be void in case the second party increases his facilities for the production of such industry, is void and against public policy.

*Oliver vs. Gilmore*, 52 Fed. 562.

The Supreme Court of the State of Washington has had occasion to pass upon this proposition in

*Fisher Flour Mill Co. vs. Swanson*, 76 Wash. 649-655-656-663.

While the Court in the above case found that the public interest will in no wise suffer for an enforcement of the contract, and enforced the same, they sustain the general proposition above stated.

A contract between the proprietors of the only two first-class hotels in a place to close one for a money consideration to be paid by the proprietor of the other in order to give the latter a monopoly of the business is contrary to public policy and void.

*Clemmons vs. Meadows*, 6 L. R. A. 847 and note.

*Shawnee Compress Co. vs. Anderson*, 209 U. S. 423 (52 L. Ed. 365), and note.

The above case holds:

"An Oklahoma compress company, though financially embarrassed, cannot lease its entire property and goodwill to a foreign corporation, with a covenant to lend its assistance to discourage competition against its tenant, and to refrain from engaging in the business of compressing cotton within 50 miles of any plant operated by the tenant, where such lease is executed in pursuance of a plan to assemble under one management or ownership the compression business in the cotton producing states."

See also *Darius Cole Trans. Co vs. White Star Line*, 186 Fed. 64.

The Court in the above case uses the following language:

"If it was the dominant purpose of both parties, when making the lease, to preserve the monopoly which they had participated in creating, and in maintaining for a period of years, the contract was, in our judgment, none the less invalid, from the fact that the lessor, instead of receiving for the use of the boat a share of the profits of a pool, obtained as annual rental an amount which experience in the pool showed was the average annual earnings assigned to the boat in question—an amount materially larger than the boat could have itself earned while operated under the lease."

1. "All agreements in general restraint of trade are against public policy and void; but agreements having such partial effect only, made in connection with the purchase of a business and its good will, shown to be reasonably necessary to the enjoyment of the goodwill of the business purchased, and not oppressive, may be enforced.

2. "Where one engaged in the same business as another purchases that of the latter, with its good will, and takes from the latter a stipulation that he will not directly nor indirectly engage in the same business in the state, nor in the United States, for the period of twenty-five years, such agreement necssarily tends to create a monopoly; and, whether necessary or not to the reasonable enjoyment of the goodwill so purchased, the interest of the public in the non-enforcement of such an agreement outweighs the interest of the purchaser in its enforcement, and it is void.

3. "Such an agreement is not devisable, for the reason that, if restrained to the limits of the state, still such restraint would be general in its nature, and obnoxious to all the objections that exist against a general restraint of trade."

> *Lufkin Rule Co. vs. Fringeli et al.*, 41 L. R. A. 185.

Cyc. sums up the proposition in the following language:

"Therefore, according to what seems to be the best considered opinion the rule as to the validity of an agreement ancillary to a sale of a business which is reasonable in other respects, is subject to the qualification that the agreement must not unreasonably restrict the available supply of, or access to, or raise the price of, any useful commodity, or tend to create a monopoly."

27 Cyc. 900.

*Stewart vs. Stearns*, 48 Southern 19.

In that case the Court held:

"But a contract not transferring a lawful business, trade, profession or occupation actually engaged in, or not transferring a lawful exclusive right, but containing an agreement to relinquish to another a common natural right not lawfully exclusive, or to refrain from the exercise of a natural right common to all to engage in a lawful business or occupation and other agreements that enable the parties, under the circumstances in which the contract will operate, to control or unduly and injuriously influence the trade relations of a considerable portion of a small community as to necessary and useful commodities may be opposed to public policy, and not enforceable. The fact that the agreements are contained in and are ancillary to a contract of lease of a storehouse does

not relieve them of their illegal effect if their tendency is to restraint of trade or monopoly, to the injury of the public.

"Where a contract places it within the power of the contracting parties to at least partially control the available supply of commodities useful if not necessary to at least a considerable portion of the local public, or to unreasonably limit the places where useful articles may be purchased, or to increase the price and consequently to restrain trade, it is substantially injurious to the portion of the public affected thereby, and is an unreasonable, and consequently an unlawful, restraint of trade, and tends to monopoly, rendering the illegal portions, if not the entire contract, unenforceable because contrary to public policy."

II.

A person not already engaged in business cannot legally agree not to engage in business, and if such agreement is made it cannot be enforced as being against public policy and in restraint of trade.

A naked agreement by one party not to engage in business in competition with another party is in contravention with public policy and therefore void.

*Gross Kelly & Co. vs. Bibo*, 145 Pac. 481-489.
*Webb Press Co. vs. Bierce*, 40 So. 203.

The above case holds as follows:

"A contract whereby a party who contemplates engaging in a lawful business in a particular place, for a pecuniary consideration paid and promised, binds himself not to do so, in favor of another, with whom he had no previous business relations and who is about engaging in the same business at the same place, is void, under the general commercial law, as in unreasonable restraint of trade, and a fortiori is unenforceable when in contravention of an express prohibition of the law of the place where it was made and is to be executed."

*Freudenthal vs. Espey*, 102 Pac. 280.

In this case the contract was upheld as being reasonable and of benefit to the covenantee, but the Court in its opinion sustains the proposition contended for by us in the following words:

"Certainly no one would contend that a contract with A, whereby B was restricted in following a trade or practising a profession in a particular place, without more, would be enforceable. It would not be enforceable because it cannot be gathered therefrom that either party would be benefitted thereby, nor would the public."

*Prescott vs. Bidwell*, 99 N. W. 93.

A contract in restraint of trade without consideration is void. A completed sale of business is

not sufficient consideration for a subsequent contract by the seller not to engage in the same business in the vicinity within a certain time.

> *Cleaver vs. Lenhart*, 37 Atl. 811.
> *Smith vs. Kousiakis*, 172 S. W. 586.

In this case a contract was held void binding a party thereto to prevent the use for two years of a building for a lunch counter in competition with the lunch business of the other party conducted in the vicinity as in restraint of trade, within revised Statute of Texas, 1911, Article 7796, defining a trust, etc., and in that connection the Court says:

> "While the rigor of the early common-law rule has been relaxed, which declares void any contract tending to restrain trade, so that the common law now recognizes as valid many agreements in partial restraint of trade, yet they are limited to covenants when ancillary to a lawful contract, as for instance, an agreement by the seller of a business not to compete with the buyer in such a way as to decrease the value of the business, or by a retiring partner not to compete with the firm, by a partner not to do anything to hinder the business of the partnership, by the buyer of property not to use it in competition with the business retained by the seller and agreements by the lessor of property not to use it in competition with the business of the lessee.

"It is a very general rule that all contracts of this character must be incident to and in support of another contract or a sale in which the covenantor has an interest which is in need of protection. The contract in question is considered by him to be certainly in restraint of trade, and since it is not ancillary to a lawful contract, it must be regarded as unreasonable, contrary to public policy, and void, irrespective of the applicability of Article 7796. *Clemmons vs. Meadows, supra,* and note thereunder."

*Klaff vs. Pratt*, 86 S. E. 74.

The grocers in a certain town agreed with a firm which was about to open a butter store, that they woul not buy butter for a term of two years; said firm paid nothing to the grocers, nor did it buy out any established business. Held that the contract was void for want of consideration, and also void as being in restraint of trade.

*Chaplain vs. Brown*, 48 N. W. 1074.

The Court in the above case used the following language, which is applicable to the facts in the case at bar.

"But it appears to us that the decision of the district court is manifestly right upon the question that the agreement is against public policy. It plainly tends to monopolize the butter trade at Storm Lake, and destroy competition in that business. It is not necessary that the en-

forcement of the agreement would actually create a monopoly in order to render it invalid, and surely, where all the dealers in a commodity in a certain locality agree to quit the business, and the plaintiffs are installed as the only dealers in that line, the tendency is, for a time at least, to destroy competition, and leave the plaintiffs as the only dealers in that species of property in that locality. Such contracts cannot be enforced."

III.

A contract made by a party already engaged in business to discontinue such business without a sale of his business and good will is illegal and void.

*Pearson vs. Duncan & Son*, 73 So. 406.
*Tuscaloosa Ice Mfg. Co. vs. Williams*, 28 So. 669-672.

One manufacturer agreed with another engaged in the same business in consideration of $1,500.00 to cease manufacturing certain articles for one year, the latter having the privilege of renewing the contract for four years more. The agreement was held void as against public policy.

*Clark vs. Needham*, 83 N. W. 1027.
*Chaplin vs. Brown*, 48 N. W. 1074, supra.

A contract between manufacturers whereby without any sale of the business of the one to the other,

one party is prohibited from manufacturing of pressed metal any parts of a diamond bar truck frame, is void as an unreasonable restraint of trade.

*Fox, etc., vs. Schoen et al.*, 77 Federal 29.
*Anderson vs. Jett*, 12 S. W. 670.

In that case the Court holds:

"An agreement between owners of two rival steamboats on the Kentucky River, that, in order to prevent rivalry and consequent reduction of charges, the net profits of each should be shared in a certain proportion, each bearing its own expense, and that, if the owners of either boat should sell with a view of going out of the trade, notice should be given to the owners of the other boat, and the owners so selling should not enter the trade again within one year, is void, as against public policy, and the owners so selling may start a new boat within the year."

*Keene Syndicate vs. Wichita Gas Elec. Co.*, 76 Pac. 834.

In that case the Court holds:

"A corporation, engaged in the business of generating and furnishing electricity for public and private use, leased to a rival corporation in the city, for a period of 10 years, machinery and appliances used in generating elec-

tricity, obligating itself by the provisions of said lease not to engage in the business of furnishing electric light and power to public or private consumers in the city during said period, and not to dispose of any of its property, machinery or appliances retained by it for producing or generating in said city electric light and power. Held, in an action on said lease to recover rents from the lessee, that the lease is in contravention of public policy, and that no action to recover rents can be maintained thereon by the lessor or its assignee."

> *Arctic Ice vs. Franklin*, 139 S. W. 1080.
> *Slaughter vs. Thacker*, 65 L. R. A. 342, 47 S. E. 247.
> *Stewart vs. Stearns*, 48 So. 19 (supra).

Under whichever of the three foregoing subdivisions the Court may find the transaction of the Commonwealth Company falls, there can be absolutely no recovery against it, for the reason that no other conclusion can be drawn from the evidence, but that the dominant purpose of all parties when entering into these transactions was to give to the Commonwealth Company a monopoly of the abstract business, and to preserve to it the monopoly which they had participated in creating. It must be equally apparent to anyone reading the evidence in this case, that the transaction of the Commonwealth Company was but one of a series of transactions

participated in by the Smith and Willoughby interests, which not only tended to, but did create a monopoly and restraint of trade and competition of the abstract business in Pierce County.

Not necessary to be complete monopoly.

*Clark vs. Needham*, 83 N. W. 1027, citing *U. S. vs. Knight*, 156 U. S. 1 (39 Law Ed. 325.)

(B) *Constitutional Provision as to Monopoly.*

I.

Article XII, Section 22, of the Constitution of the State of Washington, provides:

> "Monopolies and trusts shall never be allowed in this State, and no incorporated company * * * in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders or the trustees or assignees of such stockholders, or with any copartnership or association of persons, or in any manner whatever, for the purpose of fixing the price, or limiting the production, or regulating the transportation of any product or commodity. * * *"

The testimony and pleadings in this case show conclusively that the agreement entered into in the contract of guaranty marked "Exhibit B," was a contract and combination limiting the production of

abstracts in Pierce County, and controlling the prices thereof through the creation of a monopoly in the abstract business. This is directly prohibited by the above quoted section of the constitution, and that being true, no recovery can be had on that contract, or the mortgage given to secure the same.

The first question naturally arising is, is an abstract of title a product or a commodity? We maintain that an abstract of title is the product of labor, experience, brains and skill of the person or corporation carrying on that business. An abstract of title is a definite, tangible thing which is traded in.

The pleadings and testimony in this case, however, it seems to us, settle the question that an abstract of title is a product or a commodity. Paragraph II., of the complaint (Record p. 3) alleges that the T. I. & I. Company of Tacoma is authorized to engage in "the manufacture and sale of all kinds of abstracts of title of real estate, abstract books, and other records of the transfer of title to real estate, and to engage in the purchase and sale thereof."

Paragraph III (Record, p. 4) recites practically the same as the object and purpose of the Commonwealth Company. These allegations are admitted by the answer.

The undisputed testimony of the Foggs and Gove is that the business of an abstract company is to

manufacture and sell abstracts of title to real estate. That abstracts of title are frequently kept on hand, and under the testimony of Fred S. Fogg, (Record, pp. 124-125-126-128-132) they were bought and sold, and had a market value. That they were manufactured largely from the stock kept on hand. That they were a prime necessity in the sale of property, or the making of loans. The testimony of all the witnesses shows that an abstract is a manufactured product, and is sold over the counter, the price being based upon the number of transfers in such manufactured product. That a large amount of stock is kept on hand; that instruments effecting the title to real estate are kept in stock all the time so that all that the company has to do when an abstract is ordered is to take those instruments from its stock on hand. There are abstracts on the market. No loan of any apreciable amount, or the sale of any real estate of any appreciable amount could be made in Pierce County without an abstract of title being furnished by one of these companies. Regardless of where the information is obtained the abstract companies keep this information in books and records for that purpose.

(See testimony of Fred S. Fogg, Record, pp. 124-125-126-128-132, also Stipulations, Record, p. 133, that Horace Fogg, Franklin Fogg and Herbert Gove, if called as witnesses would testify upon direct and cross-examination as to the nature of the abstract business and

its methods of business to the same effect as the witness Fred S. Fogg.) To the same effect is testimony of J. H. Davis. (Record, p. 139.)

The Lower Court in passing upon this question in its opinion (Record, p. 172), uses the following language:

> "An abstract of title is a written statement of the substance of those public records affecting the title to particular real property. As the evidence shows, such an abstract is the product of skill and labor upon material made effective by means of a "plant." It is the written history of title to land. It may be preserved indefinitely and used in accomplishing the sale and transfer of such land. Abstracts in large cities, down to the point where acreage is platted into additions, are often printed by the hundreds from one copy, and kept in stock. Such a one becomes a commodity of value to many persons in the community not interested in the same parcels of land. The abstract is often used as a pledge or security for money borrowed. While it may be difficult to define the exact meaning of the word "commodity," that it is a word of wide scope is shown by a speech of "The Bastard" in "King John." Articles such as written abstracts of title, produced in the manner indicated, are clearly well within the confines of the word "com-

modity." Century Dict. Vol. 2, 1132; 8 Cyc. 339."

This finding of the Lower Court is not only sustained by the evidence in this case, but in conformity with the holdings of other courts on this question. It seems to us, however, that it needs no testimony to convince a court that in this day and age an abstract of title is a product or commodity, recognized as such in the market, and that no authorities need be cited on this proposition. We will, however, cite the Court to a few of the many cases that may be found holding that like instruments and business are commodities and dealing in the same.

The writing and selling of insurance is a commodity.

*Beachley vs. Mulville*, 70 N. W. 107-109.

In the last case cited defendants contended that the statute of Iowa, which is very similar to the above constitutional provision, had no application to insurance companies. The Court in holding that it did used the following language:

"However, that may be, we have no doubt of its application to insurance companies because of the language of the act. There is a manifest purpose to make the section comprehensive as to the subject-matter, as well as to persons, both natural and artificial, coming within its prohibitions. It prohibits combinations to fix the price of oil, lumber, coal, grain, flour, provisions, or any other commodity or

article whatever. Insurance is a commodity. "Commodity" is defined to be that which affords advantage or profit. Mr. Anderson, in his Law Dictionary, defines the word as "convenience, privilege, profit, gain; popularly, goods, wares, merchandise." We see no reason why, in the act, the words should be restricted to its popular use. It is common to speak of "selling insurance." It is a term used in insurance business, and law writers have, to quite an extent adopted it. Again, there are the same reasons why it should be protected against combinations as there are in matters clearly within the provisions of the law. The district court instructed the jury that the combination was prohibited by the act in question, and we think the holding was right."

Telephone service is a commodity.

*McKinley Telephone Co. vs. Cumberland,* 140 N. W. 39.

*Home Telephone Co. vs. Granby & Neosho Telephone Co.,* 126 S. W. 773.

The product of a court stenographer is a commodity and comes within the inhibition of this constitutional provision.

*Moore vs. Bennett,* 29 N. E. 388.

See *State vs. Duluth Board of Trade,* 121 N. W. 413.

In which that Court in discussing the *Moore vs. Bennett* case used the following language:

"*More vs. Bennett*, 140 Ill. 69, 29 N. E. 888, 15 L. R. A. 361, 33 Am. St. Rep. 216, seems to support the contention that a combination to fix the rate to be charged for personal services is illegal. The case grew out of an attempt of the law stenographers of the city of Chicago to fix the prices at which they would work. It is criticized in *Queen Ins. Co. vs. State*, supra, and the cases cited by the Court do not seem to be applicable upon the facts. *As a matter of fact, such stenographers furnish more than their personal services, and the compensation is measured by the quantity of the product of their labors. Thus, in the ordinary case of a court stenographer, who furnished a transcript of evidence, the party ordering it pays for what he receives at a fixed price per folio.* The proposition under consideration in *More vs. Bennett* did not include ordinary stenographers who work by the day or month, and it cannot be that such persons cannot combine and co-operate for the purpose of fixing or raising their wages, while workingmen generally are permitted to do the same thing, with the approval of the law." (Italics ours.)

The testimony in the case at bar is undisputed that the price at which an abstract is sold by the abstract company is so much per instrument, regardless of personal service, time or labor expended thereon.

*People vs. Federal Ser. Co.*, 99 N. E. 668.

## COMMODITY.

" * * * In its secondary and commercial sense that which affords advantage or profit; that which affords convenience or advantage, especially in commerce, including everything moveable which is bought and sold; an article of trade or commerce, a moveable article of value, something that is bought and sold; any moveable and tangible thing that is ordinarily produced or used as a subject of barter or sale; anything moveable that is subject of trade or acquisition; articles of trade or commerce; goods, wares and merchandise of any kind; property; something produced for use, and an article of trade or commerce."

8 *Cyc.* 339.

"3. That which is useful; anything that is useful, serviceable or convenient; particularly an article of merchandise; anything moveable that is a subject of trade or of acquisition."

*Century Dictionary*, Vol. 2, 1132.

The case of *Queen Insurance Co. vs. State*, 34 S. W. 397, which holding under a criminal statute, that insurance is not a commodity, does however contain statements applicable to an abstract and abstract business, to-wit:

"The word is ordinarily used in the commercial sense of any moveable or tangible thing that is ordinarily produced or used as the subject of barter or sale. * * * A commodity is something that may be manufactured, made, transported and sold. * * *"

"(Sec. 1.) An abstract of title is a short and methodical summary of the documents and facts which affect the title to a piece of land."

I. C. J. 365, Abstracts.

"The defendant is a corporation, the business of which, as indicated by its corporate name, is to furnish abstracts of title to real estate for a consideration paid by parties ordering the same, to be in all respects accurate and reliable."

*Glawatz vs. Peoples Guaranty Search Co.*, 63 N. Y. S. 691.

"The defendant Title Trust Co. is a corporation engaged in the business of preparing, certifying and selling abstracts of title."

*Bremerton Development Co. vs. Title Trust Co.*, 67 Wash. 269.

Personal services and labor are held in numerous decisions not to be product or commodities, but an abstract company does more than furnish personal service, it gives a manufactured product, and the dealing in the manufactured product is dealing in a

commodity, and any combination between abstract companies to limit the production of such product is clearly contrary to this constitutional provision. Much of this manufactured product is made up from stock on hand.

This constitutional provision was discussed and upheld by the Supreme Court of this State in *Manson vs. Hunt*, 82 Wash. 291.

We respectfully represent to this Court that all of the agreements, notes and mortgages in evidence violate this constitutional provision. The original transactions of December 7th, 1909, created a complete monopoly in the hands of the individual defendants. The plaintiff, who in fact is Smith and Willoughby, were parties to and assisted in the creation of that monopoly; the same was true of all of the agreements of December 2nd, 1911. At that time the ostensible competition between Commonwealth Company and T. I. & I. Company of Tacoma was terminated. The abstract plant of the T. I. &. I. Company of Tacoma was boxed up and placed in a vault in Portland, and put out of business in Pierce County, and the Commonwealth Company succeeded to practically all of its abstract business, and was thus able to get into its hands about ninety per cent of the abstract business. Smith and Willoughby were parties to and assisted in the accomplishment of this end.

The object and effect of the agreements both of December 7th, 1909, and December 2nd, 1911, were

to control the price of abstracts, and to control the production of abstracts through the means of this monopoly. Smith and Willoughby, the real plaintiffs, were parties to and participated in all of these transactions. The agreements therefore were illegal and non-enforceable, including the guaranty agreement of the Commonwealth Company of December 2nd, 1911, and the mortgage given to secure the same, and the agreement therein contained of the individual defendants to the effect that the Commonwealth agreement was legal being illegal and void, the Court will not enforce any part of any of the agreements.

As before stated, the monopoly created in 1909 was complete and absolute; the monopoly obtained by the contracts of 1911 while only to the extent of ninety per cent of the business, comes within the inhibition of the constitutional provision above quoted.

> "*Elements of Monopolization*—1. Degree of *Monopolization Requisite.* The general rule seems to be that the scheme in question must have direct effect in bringing about conditions of monopoly. Complete monopoly is not essential; but some degree of monopolization is requisite."

27 *Cyc.* 898.

> "It is undoubtedly true, under the law as it stands, that trade and commerce are 'Monop-

olized' within the meaning of the Federal Statute, when as a result of efforts to that end, such power is obtained that a few persons acting together can control the price of a commodity moving in interestate commerce. It is not necessary that the power thus obtained be exercised. Its existence is sufficient."

*U. S. vs. Patten*, 187 Fed 672.

## CONTENTION OF APPELLANT CONCERNING THIS CONSTITUTIONAL PROVISION .

Appellant claims that this constituional provision does not apply to transactions involved in this action, for the reasons,

First. That an abstract of title is not a product or commodity, and therefore not subject to monopolization under this constitutional provision.

Second. That under the statutes of the State of Washington concerning the duties of the Auditor there can be no monopolization of the abstract business.

Third. That by its terms this provision of the constitution is not self-executing, and that the legislature of the State of Washington has enacted no law giving force to the terms of this provision.

We will briefly discuss these contentions of appellant.

We maintain,

First. What we have said regarding the character of an abstract, and the abstract business, it seems to us, completely disposes of the first contention. Bear in mind at all times that we do not claim that mere personal service can be the subject of a monopoly, but we insist that under the evidence and the authorities that an abstract is more than the rendering of mere personal service. It is a manufactured product or commodity in the fullest sense of the word.

Appellant in support of its contention on page 2 of its brief, uses the following language:

> "The chage for these abstracts is based upon the number of instruments abstracted, the established price being one dollar per instrument. For the convenient and prompt preparation of abstracts, persons in the business are accustomed to keep on hand a number of copies of instruments in frequent demand which are known as 'stock'; and by taking from 'stock' the copies needed and adding thereto copies of particular instruments not kept in stock, abstracts are completed."

This sustains our theory. The One Dollar is not paid for personal service, but it is paid for the stock, overhead charges of the plant, salaries of employees, just the same as the cost of a manufactured article, like a can of tobacco is made up of the overhead charges, salary of employees and stock.

Appellant on page 12 of its brief uses the following language:

> "The certificate is a matter between the abstractor and his patron, creates no privity of contract in third persons, gives rise to no cause of action except between the abstractor and his patron, and therefore adds nothing of general value to the abstract as a commodity."

And draws the conclusion from the above that "the business is one of mere personal service and occupation," and argues from this that an abstract of title is not a product or commodity. This reasoning is fallacious.

Concede for the sake of an argument that if an abstractor should make an error in the abstract, and his certificate thereto, that there would be no cause of action against the abstractor by any third person into whose hands the abstract might come. This does not show, or tend to show, that the abstract is not a product or commodity.

The character of the warranty or guaranty of a thing sold does not determine the physical character of the thing itself. A manufacturer might give a personal guaranty to a purchaser of a can of tobacco, but whether or not third parties could sue on that guaranty does not determine the physical character of the can of tobacco, and change the transaction from one of the sale of the product or commodity into that of personal service.

The authorities cited by appellant on pages 12 to 19 of its brief are not in point, for the reason they are cases involving the character of the liability on an abstractor's certificate, and the other cases cited on those pages are cases of pure personal service.

Indeed, the case of *Heinsen vs. Lamb*, 117 Ill. 549 (7 N. E. 75), cited by appellant sustains our theory that the abstract business is not a business of personal service. The Court uses this language:

> "Data collected from records do not constitute the abstract, but only the materials out of which the abstracts are constructed."

And the case of *Baker vs. Caldwell*, 3 Minn. 94, cited by appellant, holds that a set of abstracts and books of indexes containing complete abstracts of title to all of the lands in a certain county, prepared at great cost, labor and skill of a person, are proper objects of protection by copyright.

It seems to us that there is no escaping the conclusion that an abstract of title in this day and age is a tangible and definite commodity, and is the product of the abstract company's labor, brain, plant and stock, and there are the same reasons for protecting the public against the monopolization of the abstract business as there is in protecting it against monopolization of any other useful product or commodity.

*Beechley vs. Mulville*, supra.

Second: Appellant lays great stress on pages 19 to 22 of its brief upon the provisions of the laws of the State of Washington, contained in Remington & Ballinger's Code, Section 8792, and argues from that it is compulsory upon the Auditor to furnish abstracts of title upon the request of any one paying a fee therefor, and for this reason no monopolization of the abstract business could be formed by a corporation engaged in that business.

The provision of the Washintgon statutes are set forth in full on pages 20 and 21 of appellant's brief.

This theory was exploded by the Supreme Court of this State in the case of *Dirke vs. Collin*, 37 Wash. 620, in which the Court in referring to these sections of the Code, says:

> "We think the sections above quoted were not intended to make the county auditors public abstractors, to the extent of requiring them to make a complete list of all liens and all transfers affecting particular pieces of land upon demand therefor, but, rather, were intended to require the auditor to search for certain instruments to which his attention is specifically directed by the applicant, and, if such instruments are recorded or filed in his office, to certify as provided in section 417."

(R. & B. Code, Sec. 8792.)

It is conceded that the auditor does not keep tract indices, and it is also shown by the evidence

that it would be practically impossible for the Auditor to compile abstracts without such indices.

It is also shown by the evidence that under the present conditions the only way an auditor could procure an abstract would be to get it from an abstract company. The Auditor would have to examine all of the records of his and other offices. He has authority to examine other county offices, but no authority to examine the City, or the United States offices, and would certify only to what appeared of record in his own office. It is the general practice to obtain abstracts from the abstract companies, and has been for years.

(See testimony J. L. Wadsworth, Record, p. 138.)
(See testimony James H. Davis, Record, p. 139).
(See testimony C. A. Campbell, Record, p. 140).
(See testimony W. A. Stewart, Record, p. 140).

All of the above mentioned witnesses were either County Auditors, or Deputy County Auditors from the year 1908, down to the time of the trial of this action.

It is further claimed by appellant on page 11 of its brief, as follows:

> "Indeed anyone may go into the abstract business at any time. The official records are open to him. If he chooses he may indirectly compel others in the business to give him necessary information."

It is true that the official records are open to everyone, but as Mr. Horace Fogg testified (Record, p. 122), "anyone could examine the record, but would not know whether he had all of the instruments that the County Auditor had or not. There are no indexes by which he could know whether the recorded instruments effected a given title.

Mr. Fred S. Fogg also testified (Record, p. 127), "that the reason a purchaser or mortgagee of real estate would not accept an Auditor's abstract of title was that an auditor did not have the means to prepare an abstract on which people could rely. It is a physical impossibility for the Auditor to make a reliable abstract."

There is scarcely any business that anyone may not go into at any time, but that is no argument that there may not be formed an unlawful monopoly of such business, or acts may not be done which would make an unlawful restraint of trade or competition.

The testimony in this case shows (Testimony Fred S. Fogg, p. 127), an abstract company cannot begin to transact business from the day it opens its office, and produce accurate abstracts, although in some instances the public will accept them. Indeed, the testimony shows that a considerable amount of money would have to be invested in a plant before the company would be prepared to do business, and the Court recognizes this in the portion of his opinion hereinbefore quoted.

This, it seems to us, successfully disposes of the argument of appellant on these two propositions.

Third: It is claimed in appellant's brief, at page 54, under the authority of *Northwestern Warehouse Company vs. Oregon Railway & Navigation Co.*, 32 Wash. 218, that these provisions are not self-executing, and therefore that trading corporations not engaged in public service (and aside from those in the commission business, and associations not formed for profit), are not subject to any legislative or constitutional restrictions of their power to contract in this respect, and that monopolies can thrive and flourish in this State, a thing which is condemned not only by the constitution of this State, but by the constitution or laws of nearly every State in the Union. It seems to us that this proposition cannot be upheld.

The section of the constitution above referred to says, "*monopolies and trusts shall never be allowed in this State*," and prohibits further the formation of any combination, which shall directly or indirectly combine for the purpose in any manner whatever of fixing the price or limiting the production, or regulating the transportation of any product or commodity. It then provides that the legislature shall pass laws for the enforcement of this section by adequate penalties. We concede that before any penalties can be imposed on any corporation for the violation of this section of the constitution, the legislature shall pass

a law to that effect, but that is all that is not self-executing. The constitution of the State prohibits monopolies.

The Northwestern Company case cited above was an application for a writ of mandamus directed to the railroad company commanding it to give respondents, the Warehouse Company, track connections with its railway line at the City of Pomeroy, in Washington, in such manner as to furnish respondents the same shipping facilities claimed to be now furnished to other warehousemen and shippers at said city.

It was claimed by the railway company that the constitutional provision provided for no *affirmative relief*, and that none could be given by the Court until the legislature had passed an appropriate act, this contention was sustained by the Supreme Court. It was not claimed by the railroad company, nor was it held by the court, that this constitutional provision was not self-executing, *in so far as it prohibited the doing of the acts which are thereby rendered illegal and unlawful.* That this was the contenton of the railway company is shown by their briefs in the case, from which we quote:

> "THE CONSTITUTIONAL PROVISIONS FURNISH NO GROUND FOR THE RELIEF SOUGHT IN THIS PROCEEDING:
>
> In a sense it may be true that the constitutional provisions referred to are self-executing

insofar as they prohibit the doing of acts which thereby are unlawful, but no remedy is provided in the Constitution for the enforcement of these provisions. At most, an action at law, for damages to any person injured by reason of the acts done contrary to the Constitution would be the remedy to which the person injured would be entitled. In addition to this the Constitutional Convention, in their wisdom, saw fit to add the additional requirement that the Legislature should prescribe adequate penalties for the violation of Section 22.

We contend (1) that no positive right is created by the negative provision of these sections of the Constitution; and (2) that even though a positive right be created by these provisions no means is provided for its enforcement."

Brief of appellant, *Oregon Ry. & Navigation Co.*, p. 148.

And on page 150:

"Apply this test to these sections of the Constitution. Do they create any positive rights? Do they furnish any ground for the resort to a special proceeding of this character, or any ground for the issuance of the prerogative writ of mandamus for the purpose of compelling a positive act on the part of a common carrier? On the contrary, all of Sec-

tion 22 and the only portions of Section 15 which can apply here simply forbid the doing of certain acts; *and undoubtedly, acts done in violation of them, combinations or contracts made for the purpose of fixing the price or regulating the transportation of commodities, are void,* discrimination in charges or facilities for transportation between places or persons give rise to a common law right of action for damages in favor of the persons injured. But further legislation is needed before the rights here claimed are capable of enforcement by mandamus."

"*It is our contention that the Constitution of Washington is not self-executing, except insofar as its provisions are purely negative and prohibit the doing of certain acts which are thereby rendered unlawful.* The acts are all affirmative in their nature, such as combinations for the purpose of fixing the price, limiting the production or regulating the transportation of any product or commodity. The provisions of the Constitution are general in their terms, and are intended to cover all cases."

Reply brief of Appellant, p. 25.

By consent of Counsel these briefs are filed with this Court and may be considered by it.

The question as to whether or not the acts prohibited in this provision were self-executing was

not involved in this case. The Court simply decided that no *affirmative* relief could be granted under this provision until the legislature had passed an act granting such relief. That this was the true effect intended by that decision is borne out by the decision of this Court in the case of *Manson vs. Hunt*, 82 Washington 291, in which it is held:

> "A contract between two steamship companies operating boats between the same points, whereby one, on consideration of $1,500, agreed to withdraw its boats from the route for a period of three years, contravenes Const., Art. 12, Section 22, prohibiting monopolies and providing that no incorporated company shall directly or indirectly combine or make any contract with another for the purpose of fixing the price, or limiting the production, or regulating the transportation of any product or commodity.
>
> "A note based upon a contract, knowingly made in restraint of trade, which so recited and showed that the note was part of the contract, is void as against public policy, and will not be enforced by the courts."

The Court further in the opinion says on page 294:

> "We are satisfied that our constitution in

the section quoted prohibits contracts which provide for monopolies regulating the transportation of any product or commodity. It is conceded in this case that these two companies were public carriers, carrying passengers and freight between the points named. The contract in question was clearly a contract in violation of this provision of the constitution, because it in effect provided that the Vashon Navigation Company should have a monopoly of the business between these points."

It will be noted that the Supreme Court of this State decided this case solely and alone upon the constitutional provision, and held that the prohibitive parts of that constitutional provision were self-executing, and did not find it necessary in the decision of the case to refer to any statute whatever. It is a general principle that prohibitary provisions in a constitution are usually self-executing to the extent that anythng done in violation of them is illegal.

In our opinion the case of *Manson vs. Hunt,* above cited, sustains our position, that is, that the various contracts entered into, as shown by the evidence, tended to and did form a monopoly, and therefore under both the common law and the constitutional provision above cited, are illegal and cannot be enforced. No affirmative relief is being asked. We simply lay the situation before the Court, and maintain that all of these acts are prohibited in

no uncertain language by the highest law in the State, i. e., the constitution, and for that reason the Court can grant neither party any relief, but must leave the parties where it finds them.

If appellant's contention is correct in regard to this, this constitutional provision is meaningless. It cannot be successfully maintained that contracts or transactions which have for their purpose, or tend to create monopolies can be enforced. The only thing the framers of the constitution left was for the legislature to pass acts providing for the exercise of affirmative rights and providing penalties for the violation of this constitutional provision.

It cannot be contended that contracts which tend to the formation of a monopoly are not prohibited by the constitution, and are illegal. As is said in 6 Ruling Case Law, Section 105, p. 699:

> "Perhaps the plainest example of an illegal contract is one which violates the provisions of a statute. Clearly the courts cannot recognize as valid a contract founded upon an act which is absolutely forbidden by the law-making department of the government. Broadly speaking, then, there can be no doubt that a contract is illegal if it violates a constitutional statute or if it cannot be performed without the violation of such a statute."

This position was sustained by the Court below in the following language:

"In so far as the prohibition of this section is concerned it is self-executing, though legislative action may be necessary to provide penalties for its enforcement, or to authorize recovery on account of its violation. *Manson vs. Hunt*, 82 Wash. 291. In this case it will not be necessary to consider what, if any, changes this constitutional provision made in the common law as to monopoly and restraint of trade and competition. The use of the words, "any product or commodity" relieves the court from the consideration of the question as to how necessary or useful a product or commodity an abstract of title is." (Record, p. 172.)

The case of *Long vs. Billings*, 7 Washington 267, is cited by appellant in its brief at page 56, as sustaining its position. The opinion in that case is in conformity with the opinion in the Northwestern case, supra. It simply holds that before any rights can be exercised under this constitutional provision that the legislature must prescribe the method in which the right can be exercised. We are asking for the exercise of no affirmative right in this case, but simply claiming that these various transactions are prohibited in no uncertain terms by the constitutional provision above quoted.

Appellant in its brief, at page 56, uses the following language concerning this constitutional provision:

"Standing alone, the phrase, 'Monopolies and

trusts shall never be allowed in this state,' has no meaning and affords no rule by which even the most learned and intelligent can determine whether or not a proposed cause of action is legal or illegal. Unless it is defined by other parts of the constitution, it is inoperative until the legislature has given to it a definite meaning."

We contend that the expression, "monopolies and trusts shall never be allowed in this state," is a solemn declaration of a rule of conduct that must be maintained by all business carried on in the state, and under the authority of *Irwin vs. Rogers*, 91 Washington 287, unless the words "monopolies and trust" are defined in other parts of the constitution, or the laws of the State of Washington, they will take the definition given them by the common law, and as we have shown in the former part of our brief, transactions such as those involved in this case are prohibited by the common law, therefore we maintain these transactions are prohibited by both the common law and the Constitution of the State of Washington.

It is claimed by appellant on page 57 of its brief, that the contracts in suit did not have for their purpose, and did not in fact fix the price, nor limit the production of anything. That is not the test. *The test is, did the contract put it in the power of the monopoly to fix the price and limit the commodity.* If it did it is in the inhibition of

this provision of the constitution, and as was said by the honorable district Judge, in his opinion in this case (Record, p. 176):

> "It was well understood that complete control, that is, monopoly, of the abstract business was to be acquired by securing both the independent plants, with the incidental power to fix and control prices and output."
>
> *U. S. vs. Patton*, 187 Fed. 672.

(C) *Agreement of Guaranty of Commonwealth Company of December 2nd*, 1911, *and the Mortgage Securing the Same Illegal and Non-Enforceable Under the Constitution of the State of Washington.*

I.

Article XII, Section 6, of the Constitution of the State of Washington provides:

> "Corporations shall not issue stock, except to bona fide subscribers therefor, or their assignees; nor shall any corporation issue any bond or other obligation for the payment of money, except for money or property received or labor done. The stock of corporations shall not be increased, except in pursuance of a genral law, nor shall any law authorize the increase of stock, without the consent of the person or persons holding the larger amount in value of the stock, nor without due notice of the proposed increase having been previously

given in such manner as may be prescribed by law. All fictitious increase of stock or indebtedness shall be void."

It must be conceded in this case that the corporation Commonwealth Company received no money or property, nor was any labor done for it in consideraton of the execution of the guaranty in writing attached to the complaint marked "Exhibit B" (Record, p. 25), or for the execution of the real estate mortgage attached to the complaint marked "Exhibit C" (Record, p. 30), and consequently no recovery can be had against the Commonwealth Company on either of those instruments.

The plain purpose of this constitutional provision is to prevent the issuance of corporate bonds, or the corporation entering into any other obligation for the payment of money, unless the corporation actually receives money or property, or has labor actually done for it in return at the time it executes such obligation; in other words, the obligations entered into by a corporation must be balanced by a corresponding increase in the corporation's assets.

Generally speaking a contract is binding if the promisee parts with value, although the promisor receive nothing, but we submit that this constitutional provision alters the general rule and looks solely to what is received by the corporation in exchange for its obligations; rather than what the one taking them parts with. The suppression of

the competition of the T. I. & I. Company, and thereby giving the Commonwealth Company a monopoly was neither a legal consideration, nor was it such a consideration as this constitutional provision expressly provides that a corporation must receive. If this is not true, then the constitutional provision means nothing, and the law remains the same as though there was no such provision.

The constitution of the State of New York contains a provision not so far reaching as the provision in the constitution of the State of Washington. The New York provision is as follows:

> "No corporation shall issue either stock or bonds, execpt for money, labor done, or property actually received for the use and lawful purpose of such corporation."

Section 55, *New York Corporation Law.* Consolidated Laws c. 59.

The Circuit Court of Appeals of the Second Circuit in a case decided January 11, 1916, had under consideration this constitutional provision of New York and held:

> "1. CORPORATIONS — MAKING AND ISSUANCE OF BONDS — CONSIDERATION. Under Stock Corporation Law N. Y. (Consol. Laws c. 59) Sec. 55 providing that no corporation shall issue either stock or bonds, except for money, labor done, or property

actually received for the use and lawful purpose of the corporation, bonds of a corporation could not be peldged to secure payment of a pre-existing debt, and an extension of the time for payment of the debt, or the surrender of the corporation's old note and the substitution therefor of a new note, with the same or different endorsers, did not satisfy the statute."

In re *Progressive Wall Paper Corp.*, 229 Fed. 489 and cases therein cited.

The Circuit Court of Appeals of the Ninth District had under consideration this constitutional provision of the State of Washington, and in a decision handed down November 1, 1915, used the following language:

"In respect to the $25,000.00 of the bonds so issued and delivered to the bank, we have no difficulty in agreeing with the court below that they were issued without authority, and are void; that the purported resolution of March 20, 1911, was invalid; and that those bonds were issued contrary to that provision of the Constitution of the State of Washington (Section 6 of Article 12) prohibiting any corporation of the state from issuing 'any bond or other obligation for the payment of money, except for money or property received or labor done,' and contrary to the provisions of the trust deed itself."

*Chavelle vs. Washington Trust Co.*, 226 Fed. 400-408.

*Mayfield W. & L. Co. vs. Graves Co.*, etc., 185 S. W. 485.

*Pac. Ct. Pipe Co. vs. Conrad*, etc., 237 Fed. 673.

*Lyon vs. Dakota Plow, etc. Co.*, 240 Fed. 405.

Bonds of a corporation pledged to secure antecedent indebtedness held void in

*Farmers Loan & Trust Co. vs. San Diego Street Car Co.*, 45 Fed. 518-528.

A constitutional provision of Missouri is to the same effect. Bonds of a corporation of Missouri issued to secure an antecedent debt with no new consideration, except an extension of that debt are void by virtue of such constitutional provision.

*Mudge vs. Black et al.*, 224 Fed. 919-921.

*Kemmerer vs. St. Louis Blast Furnace Co.*, 212 Fed. 63-65-69 and cases cited.

*Memphis & Little Rock Ry. Co. vs. Robert K. Dow*, 120 U. S. 287 (30 L. Ed. 595).

While in the above case the bonds were upheld, the Court at page 303 (L. Ed. p. 600), sustains the above proposition.

APPELLANT'S CONTENTION THAT THE CONTRACT OF GUARANTY AND MORTGAGE SECURING SAME ARE NOT WITHIN THE

INHIBITION OF THIS PROVISION OF THE CONSTITUTION OF THE STATE OF WASHINGTON.

I.

Appellant contends on pages 71, 72 and 73 of its brief, that the stockholders of the T. I. & I. Company of Tacoma and the Comomnwealth Company being practically the same, and therefore that all of these transactions were transactions of the Commonwealth Company, and therefore the Commonwealth Company received the consideration such as provided for in this provision, and the organization of the T. I. & I. Company of Tacoma was but a cloak to protect the Comomnwealth Company.

There can be nothing in this contention under the record in this case. It is true that the stockholders of the Comomnwealth Company and the T. I. & I. Company of Tacoma were practically the same, but in none of the transactions did the Commonwealth Company become liable, nor did it intend to become liable, and it was the purpose not only of Smith and Willoughby, the real appellants, but all the other parties, that the Commonwealth Company should not be liable in the 1909 transactions.

The first that the Commonwealth Company appeared in these transactions was the execution of the guaranty agreement, and the mortgage securing the same, in December, 1911, which we

have shown were within the inhibition of the constitutional provision above quoted.

Appellant in its brief, page 85, uses the following language:

> "While at law the theory of legal corporate entities may control, equity will always go behind it to seek out the real parties and the real interests and will never permit the fiction to accomplish a wrong or bring about injustice."

We make no issue with appellant on this proposition of law. It is not in point in this case, neither are the authorities cited in appellant's brief in point.

Appellant cites the case of *Spokane Merchants' Association vs. Clere Clothing Co.*, 84 Washington 616, in which the Court held:

> "Courts no longer hesitate to look through form and substance and ignore a mere colorable corporate entity, to the end that rights of third parties may be protected."

There is no question of protecting third parties in this case, and we cannot answer appellant's argument in this connection in a better way than by quoting from the opinion of the Lower Court in this case:

> "The fact that the stockholders of the T. I. & I. Company of Tacoma, and the Commonwealth Company, though not entirely identical,

yet were practically controlled by the same interests, has been considered. Doubtless the Court would, under certain circumstances, look through the cloak of one corporation to the body of another to prevent the consummation of a fraudulent enterprise, but this is not such a case. Mr. Willoughby, the manager of the T. I. & I. Company of Washington, himself helped to organize the T. I. & I. Company of Tacoma, which was to, and did, immediately take over the property in question. He subscribed for 48 of its 50 shares of capital stock. While it was to take over properties valued at $100,000.00, its capital stock was placed at $5,000.00, showing a purpose to minimize the liability on the part of those responsible for the corporation. Whether the T. I. & I. Company of Tacoma was created in order that the good-will and advantage of a going concern might be continued to better the security which the selling company held upon the plant and business, or whether it was created to help deceive the public in the idea that there was real competition in the abstract business, when there was none, or whether it was created for both these purposes, which latter seems the more plausible under the evidence, no assistance is afforded the plaintiff in its contention, for thereby the real plaintiffs helped to create this new corporation, whatever its purpose, and equity is not called upon to strip from the body

of the Commonwealth Company the cloak in which it is alleged to be hidden, for the advantage to those who fashioned the cloak suitable to, and probably in part intended for, that purpose. The fact that Willoughby was indemnified by the Foggs for his subscription to the capital stock of the T. I. & I. Company of Tacoma, shows that he was acting for and with them. Having knowingly elected to deal in this manner, equity is not now called upon to reform the transaction more to their present liking."

(Record, pp. 166-167).

This question is settled by the Federal Court in the case of *Pittsburg & Buffalo Co. vs. Duncan et al.*, 232 Fed. 584, in which the Circuit Court of Appeals of the Sixth Circuit held as follows:

"The mere fact that the stockholders in two corporations are the same, or that one corporation exercises a control over the other through ownership of its stock, or through identity of its stockholders, does not make either the agent of the other, nor does it merge them into one, so as to make a contract of one binding upon the other, where each corporation is separately organized under a distinct charter."

"A corporation *held* not liable on contracts of other corporations in which it owned no stock, where its business was separately conducted and the stockholders were not all the

same, although the same persons owned a controlling interest in each."

II.

It is next contended by appellant under the rule of *ejusdem generis* that this provision applies only to bonds and obligations like bonds, and they claim that it has been universally so held in other states. It is true that the reported cases are cases where the facts under consideration involved issues of bonds, but, it is also true that the constitutional provision or statute in few of the States contains the same provisions as the constitutional provision of this State. Only two of them contain the words, "or other obligation for the payment of money."

It seems to be the idea of the appellant that this constitutional provision was intended as a sort of "Blue Sky Law," for the protection of the public in buying stocks and bonds in the market, but we submit that it was intended for no such purpose; that it was intended for the protection of creditors and the owners of the corporation that its assets might not be dissipated away by entering into corporate obligations without the corporation's assets being correspondingly increased thereby.

The purpose of the similar provisions in other statutes and constitutions may be seen from the following quotations from recent decisions in the Federal Court:

"It must be assumed that the legislature, by this carefully worded provision, intended to safeguard the rights of creditors and stockholders, and to insure that whatever indebtedness was incurred by the issuance of bonds should inure to the benefit of the corporation."

In re *Waterloo Organ Co.*, 134 Fed. 341. (In re N. Y. Stat.)

"The object of the statute is to protect stockholders and bona fide creditors from the improvident issue of its bonds by the corporation, which might, and if allowed, probably would, result in wrecking the corporation * * * "

*Pfister vs. Milw. Elec. Ry. Co.*, 53 N. W. 27 (Wis.)

Quoted with approval in *Kemmerer vs. St. Louis Blast Furnace Co., et al.*, 212 Fed. 63.

"The object of the enacting bodies was to prevent the issue by a corporation of any stock or bonds unless the corporation received instead of them an amount of value equal to the par value thereof, and this to the end that the amount of stock and bonds of a corporation should not misrepresent and deceive those who dealt with it regarding the value of its assets. Now in these cases the corporation received no money, no labor, or property, no increase of its assets, for, or instead of the bonds it pledged

for its old debts. In each case it had the same amount of assets the moment before it made the pledge that it had afterward."

> *Kemmerer vs. St. Louis Blast Furnace Co., et al.*, 212 Fed. 63 (Mo. Stat).

"The purpose of the statute is the protection of the stockholders and the creditors against an indebtedness created by the issuance of bonds for which the corporation does not at the time receive either money, labor or property. The bank must be assumed to have known that the law of the state expressly forbade the corporation from issuing bonds unless for money, labor or property actually received. It also knew that it was receiving the bonds without giving the corporation either money, labor or property. It took the bonds with notice of this infirmity in its title, and is not therefore a bona fide holder."

> In re *Progressive Wall Paper Co.*, 229 Fed. 489 ( N. Y. Stat.).

Under an attempted application of the rule of *ejusdem generis*, plaintiffs contend that the constitutional provision is limited to bonds and obligations like bonds. The rule of *ejusdem generis* is not applicable. It is an established rule of construction that, particularly in the construction of constitutional provisions, effect must be given to all consistent provisions. The constitutional provision

under discussion provides "nor shall any corporation issue any bond or other obligation for the payment of money, except for money or property received or labor done * * * All fictitious increase of stock or indebtedness shall be void." The last sentence is a declaration of the intent and purpose of the prior part of the provision. The prohibition against fictitious indebtedness is general, and is not limited to indebtedness created or evidenced by bonds or or obligations like bonds. As bonds and obligations like bonds constitute only one form that may be used to evidence an "indebtedness" full effect cannot be given to the word "indebtedness" by limiting it to indebtedness evidenced by bonds or obligations like bonds.

It is apparent that the Constitutional provision was intended to strike at the creation of fictitious indebtedness as a substantial thing, and not merely at the *form* by which that indebtedness might be evidenced, for the evils of fictitious indebtedness would be the same whatever the form of the obligation evidencing it. For example, while it is conceded that a corporation cannot issue its own bonds, except for money or property received or labor done, yet under the theory of the appellant it would be perfectly permissible for a corporation to guarantee an issue of bonds of another corporation, and give a mortgage on its corporate assets as security for its guaranty, without the guaranteeing corporation receiving a single thing of value therefor. Is it possible that the Commonwealth Company,

while it could not so issue its own bonds, could guarantee the notes or bonds of the T. I. & I. Company of Tacoma, without receiving a single thing of value therefor, and that while the former would not be binding on the Commonwealth Company that the latter would? If that is so it would furnish an easy evasion of the law.

In prohibiting the creation of fictitious indebtedness, the constitution apparently meant to lay down the rule that the indebtedness of a corporation would be fictitious unless the indebtedness was created "for money or property received or labor done."

If attention be paid to the broad general declaration of the constitution, that all fictitious indebtedness, i. e., indebtedness for which the corporation has not received money or property or labor—shall be void, it at once becomes apparent that the important word in the sentence "bond or other obligation for the payment of money" is not the word "bond" but is the word "obligation" with the qualification or *test of similarity* that it must be an obligation "for the payment of money." The constitutional provision was not intended to be limited to the particular *form* of obligations called bonds—for the substantial evil struck at was much broader—nor was the provision intended to be applied to obligations for anything other than "the payment of money."

This rule was laid down in *Weiss vs. Swift & Co.*, 36 Pa. Super. Ct. 276, quoted with approval and

applied in *Kansas City Southern Ry. vs. Wallace,* 132 Pac. 908, 46 L. R. A. (N. S.) 112, in the following language:

"In the case of *Weiss vs. Swift & Co.*, 36 Pa. Super. Ct. 276, was one wherein the act in question read as follows: 'In every sale of green, salted, pickled, or smoked meats, lard and other articles of merchandise, used wholly or in part for food,' etc. The question before the court was whether "eggs" were included within the act. In holding that they were, in its discussion the court said: "If the words were 'every sale of green, salted, pickled or smoked meats, lard and other articles of merchandise,' without more to indicate the subjects of sale intended to be covered, there would be propriety in applying the general principles of construction that when certain things are enumerated, and then a phrase is used which might be construed to include other things, it is generally confined to things *ejusdem generis.* * * * But in applying this principle of construction, and in determining what things are *ejusdem generis*, regard must be had to the general subject to which the act relates. Things which plainly belong to the same class when considered with reference to another subject. The rule would be absurd if under the head 'other' nothing can be included in the construction of the act which is

not exactly the same in every particular as the thing specified. * * * Moreover, it has been held upon sound reason that, when the particular word or words exhaust a whole genus, the general term will not be regarded as surplusage, but will be construed to refer to a larger class. This must be so, if regard be had to the rule, which is more imperative than the rule *ejusdem generis*, that a statute is to be considered as a whole, so that, if possible, effect will be given to every part of it. Here the subject to which the act relates, as shown by the body of it, as well as by its title, is the sale of provisions by description; and, considering the specific words "meats" and "lard" as furnishing a sample of the kind of provisions referred to, the words "other articles of merchanidse" upon the proper application of the rule *ejusdem generis*, would be confined to such provisions as are 'used wholly or in part for food,' and this would include eggs. We take it, therefore, that if the last quoted words had not been added in the statute, the words 'other articles of merchandise' would have included eggs, because, having regard to the subject of legislation, they are of the same kind of things that are specially mentioned. *At any rate, by adding the words, 'used wholly or in part for food,' the legislature set up the standard of similarity to the things specifically mentioned to which the other articles of merchandise must*

*conform; and no principle of construction requires to impose any other test, except that the articles of merchandise come up to this standard and, in addition, be such as are comprehended within the term 'provisions,' as that term is commonly understood when used in such connection as this."*

"The doctrine of *ejusdem generis*, however, is only a rule of construction, to be applied in ascertaining legislative intent, and does not control where it clearly appears from the statute as a whole that no such a limitation was intended. Nor does the doctrine apply where the specific words of a statute signify subjects greatly different from one another, nor where the specific words embrace all objects of their class, so that the general words must bear a different meaning from specific words or be meaningless."

36 *Cyc.* 1121-2.

In the case of *State ex. rel. Improvement Co. vs. Bridges*, 19 Wash. 431, the statute authorized extensions of all contracts issued by the State "to purchasers of school or other lands," upon payment of delinquent and accruing interest, and the court was asked to restrain the commissioner of public lands from cancelling on the public records a certain contract between the State of Washington and the petitioner for the purchase of tide lands. It was contended that under the rule of *ejusdem*

*generis* the words "other lands" necessarily mean the same kind of lands as the kind expressed, viz., school lands, and that school lands being granted lands the provision "or other lands," must refer exclusively to other granted lands. The court held, however, that from investigation of the whole act they were of the conclusion that it was not the intention of the legislature to place the restriction contended for.

And in *State vs. Plastino*, 67 Wash. 375, where the Court said:

> "The information was drawn under Sec. 2004, Rem. & Bal. Code, providing:
>
> 'In all cases where any child shall be a delinquent or neglected child, as defined by the statutes of this state, the parent or parents or persons having custody of such child, or any other person, responsible for, or by any act encouraging, causing or contributing to, the delinquency or neglect of such child, shall be fined * * * or imprisoned * * * '
>
> "The court below applied the rule of *ejusdem generis* to the statute, and held that the words 'any other person' were controlled in their meaning by the specific enumeration of persons in the preceding clause, and for this reason only parents or other persons *in loco parentis* having custody of the child, could be informed against under this statute.
>
> "We cannot concur in this ruling. The rule

of *ejusdem generis* is to be used with other rules not less important, such as the determination of the evident intent of the law-making body, and does not warrant the courts in confining the operation of the statute within narrower limits than was intended by the lawmakers. In re *Lotzgesell's Estate*, 62 Wash. 352, 113 Pac. 1105, it affords a mere suggestion to the judicial mind that, where it clearly appears that the legislature had in mind a particular class of persons or things, the words of general description were not intended to embrace any other than those within the class. Every legislative act should be so construed as to carry out the object sought to be accomplished by it, so far as that object can be gathered from the language of the act; and this rule, like every other rule, is to be made use of in ascertaining and giving effect to that meaning, rather than to hamper and restrict the evident intent of the law-making body.

*Lewis Sutherland, Statutory Construction,* Sec. 437.

"The evident meaning and intent of this act is to protect delinquent children in the hands of all persons. It never was intended by the legislature that the language employed by it in framing the act should be so read as to furnish protection to these children from the sins of their parents or custodians, but permit other

persons to escape the consequences of their contribution to the delinquency of the child."

In the case of *Strange vs. Board of Commissioners*, 91 N. E. 242 (Indiana), the Court was asked to restrain the County Commissioners from letting a contract to pave a highway with brick, on the ground that the general highway act provided that highways should be paved "with stone, gravel or other road paving material," and that the rule of *ejusdem generis* must be applied, and that "other road paving material" means material of a similar kind to stone or gravel. The Court affirmed the judgment of the lower court in sustaining a demurrer to the complaint, saying:

> "It is next urged that the rule of *ejusdem generis* should be applied, and that the phrase, 'other paving material' should be held to refer to the prior word, 'stone' or 'gravel,' and limit the material on country roads to stone or gravel or like material. The rule of *ejusdem generis* is not in and of itself a rule of interpretation, but an aid to interpretation, when the intention is not otherwise apparent. Black, Interpretation of Laws, pp. 143-145. It is a rule of application of the rule of *ejusdem generis* that when the prior or specific words exhaust the class or genera there is nothing for the remaining terms to qualify, and following the rule that all parts of a statute shall if possible be given effect, the general words are to

be given effect if that can be done, and that the rule shall not be invoked to restrict the operation of the act within narrower limits than the legislature intended. *United States, etc., vs. Cooper* (1909), 172 Ind.——, 88 N. E. 145-146. Black, Interpretation of Laws, pp. 145-146. Endlich, Interpretation of Laws, Sec. 409. Here the words 'stone' and 'gravel' entirely exhaust each class or genera, and unless the remaining words mean something else, they can mean nothing, which will not be imputed to them if avoidable, and we place our decision in this respect upon the ground that the phrase 'other paving material' necessarily means something other than either stone or gravel, and that the Legislature intended giving to the localities an opportunity to use such materials as were necessary, or best suited to the end to be attained. The rule of *ejusdem generis* that general words following a particular enumeration will not include things of a superior class has no application where the rule would leave the general words without meaning or effect. Sutherland, Statutory Construction, Sec. 436. This construction gives effect to the whole statute, and is also in harmony with the theory of using such material as may be suited to the particular needs in improving city or town streets or country roads, with proper limitations upon unnecessary or excesive cost by those most concerned."

In the case of *United States vs. Mescall*, 215 U. S. 26, 30 Sup. Ct. 19, 54 L. Ed. 77, the Supreme Court had under consideration a Federal Statute providing for the forfeiture of goods or their value where "any owner, importer, consignee, agent or other person" shall make an entry by means of false or fraudulent practices or shall be guilty of any unlawful act or omission whereby the United States is deprived of the lawful duties and for the punishment of such person by fine or imprisonment or both. A customs employe was under indictment for making and returning false weights in conection with an entry of imported merchandise and it was contended that under the rules of *ejusdem generis* he was not in fact any of the persons within the contemplation of the statute. Mr. Justice Brewer, delivering the opinion of the Court, said:

> "Counsel for defendant invokes what is sometimes known as Lord Tenderden's rule, —that, where particular words of description are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described,—*ejusdem generis*. The particular words of description, it is urged, are 'owner, importer, consignee, agent.' The general term is 'other person,' and should be read as referring to someone similar to those named, whereas the defendant was not owner, importer, consignee

or agent, or of like class with either. He was not making, or attempting to make, an entry. He represented the government, and contrary to his duties, was rendering assistance to the consignee, who was making the entry. But, as said in *National Bank vs. Ripley*, 161 Mo. 126, 132; 61 S. W. 587, 588, in reference to the rule:

"But this is only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast-iron rule, it does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument. * * * Whilst it is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the genus, there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning outside of the class indicated by the particular words, or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule woudl defeat its own purpose.'

"See also *Gillock vs. People*, 171 Ill. 307, 49 N. E. 712, and the cases cited in the opinion;

*Winters vs. Duluth*, 82 Minn. 127, 84 N. W. 788; *Matthews vs. Kimball*, 70 Ark. 451, 462, 66 S. W. 651; 69 S. W. 547. Now, the party who makes an entry, using the term 'entry' in its narrower sense, is the owner, importer, consignee, or agent; and it must be used in that sense to give any force to the argument of counsel for defendant; but, used in that sense, the term, 'other person' becomes surplusage. In Sec. 1 of Chap. 76, Laws of 1863 (12 Stat. at L. 738), is found a provision of like character to that in the first part of the section under which this indictment was found, but the language of the description there is 'owner, consignee, or agent.' This was changed by Section 12, Chap. 391, Laws 1874 (18 Stat. at L. 188) to read 'owner, importer, consignee, agent, or other person,' and that description has been continued in subsequent legislation. Evidently the addition in 1874 of the phrase 'other person' was intended to include persons having a different relation to the importation than the owner, importer, consignee or agent. Congress was broadening the scope of the legislation and meaning to reach other persons having something to do in respect to the entry beyond that which was done by the owner, importer, consignee, or agent, or else the term 'other person' was a meaningless addition. Now the defendant was a person, other than the owner, importer, consignee, or agent, by whose

act the United States was deprived of a portion of its lawful duties. His act comes within the letter of the statute as well as within its purpose; and the intent of Congress in the legislation is the ultimate matter to be determined."

In this connection we wish to call the Court's attention again to the case of *Farmers' Loan & Trust Co. vs. San Diego Street Car Co.*, 45 Fed. 518, 528. In this case, part of the bonds in question were pledged for the company's own preexisting indebtedness and part of them were pledged as collateral security for a debt, not of that company, but of the Coronado Beach Company. The San Diego Street Car Company thereby virtually put itself in the position of guaranteeing the debt of the Coronado Beach Company to the extent of those bonds. The court held these bonds to be invalid, and we believe that this case is a very close one on the questions involved herein.

Appellant cites and relies largely upon the case of *Memphis, etc. Ry. vs. Dow*, 120 U. S. 287 (30 L. Ed. 595). This case does not sustain appellant's contention.

It was a case decided on a constitutional provision of Arkansas, which prohibits corporations from issuing stocks or bonds, except for money actually received or labor done, and the court in that case simply held that when stock or bonds had ben issued by a corporation based upon a present

consideration of money, property, or labor actually received, the corporation was not bound to receive *par* for the stock or bonds so long as they were issued for a legitimate corporate purpose, and were not a mere device to evade the law and accomplish that which was forbidden. But that case does hold that no corporation can issue stock or bonds, except for a present consideration moving to the corporation of labor, property or money, and upholds our contention in every particular.

Appellant, on page 73 of its brief, makes the following startling statement:

> "In no reported case has an attempt been made to apply this, or any similar constitutional provision to restrict the power of the corporation to enter into contractual relations by which it obligates itself to pay a debt."

This statement is not only not sustained by the authorities, but is contrary to all the authorities.

(See cases cited.)

And we challenge counsel to find one single adjudicated case where any State with a constitutional provision similar to ours a corporation has issued its stock, bonds, notes or other obligation for the payment of money, for either the payment or security of a pre-existing debt of the corporation, or as security for the payment of a debt of a third party wherein the same have been upheld.

The Honorable District Judge in his opinion in this case uses the following language concerning this contention of appellant:

"Plaintiff contends that under the *ejusdem generis* rule the words 'or other obligations for payment of money', following in the section of word 'bond', should be held to mean a bond-like obligation only. If it be asumed that the guaranty and mortgage are not bondlike obligations, yet, in view of the plainly apparent purpose of the provision to protect the creditors and stockholders of the corporation by forbidding its issuance of promises to pay money unless it receive on account thereof, money, property or labor, no necessity appears for invoking the rule of *ejusdem generis* as an aid to interpret this provision. *Kemmerer vs. St. Louis Blast Furnace Company et al.*, 212 Fed. 63; *In re Progressive Wall Paper Corp.*, 229 Fed. 489; *Farmers' Loan & Trust Co. vs. San Diego St. Car Co.*, 45 Fed. 518, 528; United *States vs. Mescall*, 215 U. S. 26; 91 N. E. 242; *The State of Washington vs. Sam Plastino*, 67 Wash. 374, 375. It was the substance of the baseless promise to pay that was aimed at, and not merely its form. Especially should this be the rule in interpreting constitutional provisions which are always to be construed broadly. If this provision does not forbid a guaranty and mortgage, given to secure the debt

of another, then it was needless to forbid the issuance of bonds, for an easy way was left open to avoid the prohibition.

The use of the word 'issue' in the section, whereby it is made to read, 'nor shall any corporation issue any bond or other obligation for the payment of money,' etc., may show that a formal written obligation was contemplated, and that the ordinary daily dealings of the corporation in carrying on its business was not aimed at. No other limitation is apparent in this regard."

(Record, p. 165.)

## III.

Appellant claims that under any construction of this constitutional provision the contracts referred to are not within its inhibition, and if they are they were simply *ultra vires* acts, and that the corporation and the stockholders are estopped from denying their legal liability by reason of the stockholders having consented and approved of the execution of these instruments.

(See Appellant's brief, p. 80.)

This contention cannot be upheld.

It seems to use that appellant mistakes our contention in this regard. While in our opinion this contract of guaranty, and the mortgage securing the same were *ultra vires* of the Commonwealth Company, that company is defending solely on the

ground that the contract of guaranty is absolutely prohibited by the constitutional provision cited, and for that reason there can be no recovery. This constitutional provision in no uncertain terms says:

> "Corporations *shall not* issue stock, except to bona fide subscribers therefor, or their assignees, nor shall any corporation issue any bond *or other obligation for the payment of money*, except for money or property received or labor done. All fictitious increase of stock or indebtedness shall be void."

It isn't a question of the Commonwealth Company exceeding its powers, as set forth in its charter, it is the question of it doing something absolutely prohibited by the constitution. When it appears in the case that an act has been done by a corporation absolutely prohibited, the court must stop, and can grant no relief. That provision of the constitution is something that cannot be waived by the corporation; if it should attempt to waive it, and the court during the trial should discover it, the court would be in duty bound under all the authorities to refuse relief. This constitutional provision differs from like provisions in the other States. Most of the other States have the prohibition against the issuance of bonds, or notes, while this provision prohibits it from issuing bonds, *or other obligations for the payment of money.*

Apellant's counsel do not seem to comprehend

the distinction between an *ultra vires* act, and an illegal act, or one prohibited by law. That distinction is well stated in 7 R. C. L. Sec. 677 and other authorities, as follows:

> "* * * *A contract of a corporation may be both ultra vires and illegal, though it by no means follows that because such a contract is ultra vires it is also illegal, nor is illegality a necessary, or perhaps even a usual, characteristic of ultra vires contracts.* Whether a contract is illegal or not is determined by its quality, and in this connection it matters little whether it be the contract of an individual or of a corporation, whether it be *ultra vires* or not is determined from a consideration of the powers expressly conferred on the corporation by the instrument of its creation, together with those other powers implied in the purposes of its creation and in the powers expressly granted. Of course a contract of a corporation to do an immoral thing, or for any immoral purpose, or against public policy, is void, and gives no right of action. The doctrine, therefore, is not peculiar to contracts of corporations. It has its root in the universal principle that persons shall not stipulate for iniquity. *Another principle of general recognition is that a corporation can not enter into and bind itself by a contract which is expressly prohibited by its charter or by statute; and in the applica-*

*tion of this principle it is immaterial that the contract, except for the prohibition, would be lawful.* No one can be premitted to justify an act that the legislature, within its constitutional power, has declared shall not be performed."

> Citing *Mutual Guaranty Fire Ins. Co. vs. Barker*, 107 La. 143, 77 N. W. 868, 70 A. S. R. 149 and Note.
>
> *Bath Gas Light Co. vs. Claffy*, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664.

*Distinction between Ultra Vires and Prohibited Commercial Paper .*

a. In General. *With respect to the doctrine of Ultra Vires, a well grounded distinction exists betwen acts which are beyond the power conferred by statute upon the corporation in express terms, and acts which are prohibited by the express language of the statute.* With respect to the former class of cases, the question presented to the intending customer of the corporation is often a nice question of interpretation, and the officers of the corporation presumptively have a better opportunity of understanding the limits of the power of the corporation than the customer has. The law will not therefore allow the corporation to take the benefits of the contract and escape the burdens. *But with respect to contracts which are prohibited by the terms of positive statutes the*

*rule is different. Applying the rule to commercial paper issued by corporations in contravention of statutory prohibitions, the rule is that such paper is absolutely void in the hands of any person, who may receive it; and this rule applies to the holders of such paper who reside outside the state in which the corporation has its origin and domicile and whose laws prohibit the issuing of the particular paper. Neither can an endorsee of such a note recover upon it in an action against his indorser. The note being void it will not be admitted in evidence in such an action although the holder of it might sue his endorser and recover of him the consideration paid for it.* So if a bank draws a draft in violation of an express law, and the holder of it transfers it to his creditor in payment of a debt, and the bank becomes insolvent, such trasferee can not maintain an action upon it against his transferer. Under a statute in Massachusetts prohibiting banking corporations from receiving or negotiating the bills or notes of foreign incorporated banks, except the bills of the bank of the U. S., it was held that a promissory note, payable in the prohibited bills to a banking corporation in Massachusetts was void, and that no action could be maintained upon it even after the statute had been repealed."

10 *Cyc.* 1116.

The distinction between an *ultra vires* act and an illegal act of a corporation is well stated by the Federal Court of the Second Circuit in re *Grand Union Company*, 219 Federal 353, the Court using the following language: (Op. p. 363):

"But we are told that the defense of *ultra vires* cannot be raised in this collateral proceeding. The phrase '*ultra vires*' unfortunately has been used to designate, not only acts beyond the express and implied powers of the corporation, but also acts which are contrary to public policy or contrary to some statute expressly prohibiting them. The latter class of acts are now termed 'illegal,' and the term '*ultra vires*' is confined to the former class. '*Ultra vires* contracts are contracts which are beyond the statutory powers of the corporation, and not contracts expresly prohibited by statute and contrary to the public policy of the Legislature.' Cook on Corporations (7th Ed.) vol. 3, p. 2161, note. We do not need to consider when the defense of *ultra vires* may or may not be interposed. The objection here is, not that the contract is *ultra vires*, but that it is illegal. While a corporation is held in some states to be estopped from setting up the defense of *ultra vires* by having received the benefits of the contract, the courts so holding do not apply that principle to cases in which the contract is absolutely void. *National Home*

*Building, etc., Co. vs. Home Savings Bank*, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245; 10 Cyc. 1161, 1162."

The same distinction between an *ultra vires* and an illegal contract is recognized by the United States Supreme Court in *D. La Vergne R. & M. Co. vs. German Savings Institution*, 175 U. S. 40; 40 L. Ed. 65; 20 Supreme Court Reports 20.

The same principle is announced by the English courts.

> *Scotish N. W. R. Co. vs. Stewart* (1859), 5 Jur. N. S. (Eng.) 607.
>
> *In re. Birkbeck Permanent Benefit Bldg. Soc.* (1912 C. A.), 2 Ch. (Eng.) 232.

There can be no ratification by the stockholders or trustees of a corporation of an act of the corporation prohibited by law, and thus make the same enforceable.

The cases cited by appellant of ratification and estoppel are cases where the acts were merely *ultra vires* and not illegal. That there can be no estoppel or successful ratification of an illegal act is established by the law of this country as well as of England.

It is aptly stated by Lord Cairns in *Ashbury R. Carriage & Iron Co., vs. Riche* (1875), L. R. 7 H. L. 672, 2 English Ruling Cases 304:

"If it was a contract void at its beginning,

it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder of the company had said, 'that is a contract which we desire to to make, which we authorize the directors to make, to which we sanction the placing the seal of the company,' the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by the act of Parliament, they were prohibited from doing."

To the same effect in *re British Provident L. & F. Insurance Co.* (1883), 9 Jur. N. S. (Eng.) 631.

We are at a loss to understand upon what appellant's counsel base their remark on page 85 of their brief, in which they state:

"We do not concede that the Commonwealth Co. did not receive money's worth for its agreement of guaranty. It had property at stake liable to be foreclosed and lost. It was relieved of the burden to its business caused by the expenses of an unnecessary plant. Its business was relieved of the burden it was carrying of a large debt at a high rate of interest and due in substantial payments."

There is no evidence to sustain this statement,

in fact all of the evidence shows that the Commonwealth Company received nothing for the execution of its guaranty and mortgage securing the same, except the suppressing of competition and the removal of the danger of the T. I. & I. Company of Washington foreclosing its mortgage upon the T. I. & I. Company of Tacoma plant, and thus again place it in business in competition with the Commonwealth Company. This was not a consideration recognized by the constitutional provision above quoted.

The Lower Court, however, disposed of this question in the following language (Record, p. 164):

> "As no money or property were received by the Commonwealth Company, nor labor done on its acount, it is considered obvious that its guaranty and mortgage securing the debt of the T. I. & I. Company were given in violation of the foregoing provision. They are, therefore, both void as in violation of a law rather than *ultra vires* for mere want of power. 10 Cyc. 1116."

SECOND.

LIABILITY OF INDIVIDUAL DEFENDANTS.

I.

Non-enforceability of an agreement or guaranty growing out of an illegal agreement.

As before stated, it must be plain to the Court that the agreement, "Exhibit B", executed by the Comonwealth Company, and "Exhibit C", the mortgage securing the same, as between it and the plaintiff are ilegal and non-enforceable. It is claimed that the individual defendants in this case can be held by reason of the following provision in "Exhibit B":

> "The undersigned, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, in consideration of the acceptance of the foregoing guaranty and agreements by the said Traders Trust Company of Oregon, and other valuable consideration do hereby agree and guaranty to and with the said Traders Trust Company that the foregoing guaranty, and each and every part thereof, is based upon a valuable consideration sufficient in law to bind the Commonwealth Company, and that the same is a valid and subsisting obligation of said Company."

This guaranty agreement of the individual defendants was part of the same transaction, (Exhibits "B" and "C", attached to the complaint), and was therefore necessarily illegal and void, for the reason set out above. This guaranty of the individual defendants being founded on the guaranty agreement of the Commonwealth Company, and "when the foundation fails all goes to the ground."

We contend that these individuals cannot be held,

(a) Because there was no consideration for their executing this contract;

(b) Because the contract itself is illegal, for all the reasons hereinbefore stated;

(c) Because this guaranty of the individual defendants is founded upon an illegal agreement, and is therefore itself illegal.

Any contract or agreement which is based upon an illegal contract canot be enforced.

A recovery upon an account for goods sold and delivered by a corporation created to effectuate a combination of wall paper manufacturers intended and having the effect directly to restrain and monopolize trade and commerce cannot be had.

> *Continental Wall Paper Co. vs. Voight & Sons Co.*, 212 U. S. 227 (53 L. Ed. 486-505-506).

In any action brought in which it is necessary to prove an illegal contract in order to maintain the action courts will not enforce it, nor will they enforce alleged rights directly springing from such contract.

> *McMullen vs. Hoffman*, 174 U. S. 638 (43 L. Ed.) 1117-1127-1128.

In the case at bar in order to recover against the individual defendants it would be necessary to prove, and introduce in evidence as part of the proof,

the contract of guaranty of the Commonwealth Company in order to make out a case against the individual defendants, and under the ruling in the case last cited, as soon as the illegality of the Commonwealth guaranty was shown no recovery could be had against the individuals.

So a new contract based upon compromise of an illegal contract cannot be enforced.

*Stewart et al. vs. W. T. Rawleigh Med. Co.*, 159 Pac. 1187.

The above case is particularly in point with the instant case, for the reason it was an attempt to hold the sureties on a written contract, which contract was in itself a contract in restraint of trade and competition, and therefore illegal.

*Union Collection Co. vs. Buckman*, 9 L. R. A. (N. S.) 568; (88 Pac. 708).

An agreement attempting to nullify a statute regarding purchase and sale of stocks, etc., was void and no recovery could be had thereon.

*Cory vs. Griffin*, 63 N. E. 420.
See *McMillan vs. Barbour Asphalt Pave. Co.*, 38 N. W. 97.

The Supreme Court of the State of Washington has had ocasion to pass upon this question in several decisions, and have upheld the contention of defendants.

Where a secret contract employing an agent to procure a recall election was void as against public policy the agent cannot recover for moneys expended as upon an executed, independent, implied contract of deposit, where to make a case plaintiff must rely upon the illegal contract itself, since the law will leave the parties where it finds them.

*Stirtan vs. Blethan*, 79 Wash. 10-16-20.
See also *Lewer vs. Cornelius*, 72 Wash. 124-129.
*Tompkins vs. Seattle Const. Co.*, 54 Wash. Dec. 442.
*Moser vs. Pantages*, 54 Wash. Dec. 114.

II.

Non-enforceability of contract of sureties or guarantors of an illegal agreement.

Greenhood in his work on the doctrine of public policy, on page 1, lays down two rules:

"Rule 1. Any contract made by a competent party, upon valuable consideration, when made freely and intelligently, is valid, unless it comes within Rule II.

"Rule II. But if such contract bind the maker to do something opposed to the public policy of the State or Nation, or conflicts with the wants, interests, or prevailing sentiment of the people, or our obligations to the world, or is repugnant to the morals of the

times, it is void, however solemnly the same may be made."

Then further on page 14, the author says:

"Rule XV. Any contract of suretyship for the faithful performance of a contract within Rule II., is equally void (a), even though the surety has been fully indemnified by the principal debtor (b)."

And further on page 210 the author says:

"A contract to indemnify one from liability on an illegal contract (a), or for assuming a responsibility which it would be illegal for the promisor to assume (b), is void."

And further on page 211:

"Any contract to save one harmless from the consequences of an unlawful act (a), or breach of duty (b), is void."

*Child's on Suretyship*, at page 254, uses the following language:

"Section 133. A surety will not be bound if the principal executed the contract under duress, unless the surety signed with knowledge theerof; nor will a surety be bound if the principal was enduced to enter into the contract through fraud of the creditor; or if the principal's contract be illegal."

And agan on page 255, as follows:

"Illegality of Principal Contract is a defense to the Surety. If the principal's contract is illegal, the surety is not liable.

"Sec. 56. A surety is not bound if the contract is illegal. An illegal contract is void, and a surety thereon incurs no liability."

*Brandt on Suretyship and Guaranty*, Section 4, page 21, says:

"A contract of indemnity must not be against public policy."

And also on Section 19:

"If there is no principal contract, or if the principal contract is void as against public policy, or for want of consideration, or for want of proper parties, or for any other reason, there can be no contract of suretyship."

And in Section 30:

"When the act of the principal for which the surety undertakes to become responsible is prohibited by law, the surety will not bound."

These general principles as laid down by the foregoing text writers are sustained by the great weight of authority:

The sureties on a bond declared to be illegal were released in

*Smith vs. Alabama Fruit Growing Assn. et al.*, 26 So. 232.

This case is approved by the Supreme Court of this State in

*Jorguson vs. Apex Gold Mine Co.*, 74 Wash. 243.

In which the Court holds the guaranty of a corporation to pay dividends not earned void.

"While a surety on a corporation contract may be estopped by his execution of the contract to plead that it is *ultra vires* of the conporation, such contracts being objectionable only because they involve some matters beyond the scope of the corporate charter, there is no such estoppel as to a contract which is opposed to establish principles of public policy, or based upon an illegal consideration, or forbidden by statute."

*Schaun vs. Brandt*, 82 Atl. 551.

Endorser of note of corporation which is prohibited from issuing notes is not liable theeron.

*Southern Loan Co. vs. Morris*, 44 American Dec. 188.

See *Bath Gas Light Co. vs. Chaffy*, 45 N. E. 390.

In this case the Court upheld the contract solely on the ground that it was *ultra vires*, and not il-

legal, but held that if it had been illegal the surety would have been released.

A guaranty of an illegal contract made on behalf of a City being intended to secure the performance of an unlawful act, is void, and cannot be enforced.

> *Howard vs. Smith*, 38 S. W. 15.

To the same effect is:

> *Keith Co. vs. Ogalalla Power Co.*, 89 N. W. 375.

In this case suit was brought upon a bond to secure the performance of a contract, which contract the Court held was invalid, and hence that the bond was without consideration and non-enforceable.

Under the California Code contracts which fix the amount of damages for a breach are void and a contract of guaranty to pay the peanlty prescribed for the breach is void, and does not bind the maker to pay even the actual damages incurred by such breach.

> *Jack vs. Linsheimer* (Calif.), 58 Pac. 130-132.

This principle has been recognized by the Courts of this country from the earliest decisions.

> *Swift vs. Beers*, 3 Denio. 67 (17 N. Y. Common Law Rep. 284).

So also in *Gill vs. Morris*, 27 Am. Rep. 744 (Tenn.).

It was held that a surety on a promissory note may plead in bar a judgment discharging the principal on account of the illegality of the note. (Confederate money case.)

The facts in the above entitled case are that in 1862 Gill loaned to Creed $1,500.00 in Confederate money and took his note with Morris as surety. In a suit brought on this note against Creed the Court held that the note was based on an illegal consideration and dismissed the action. Afterward suit was brought against Morris, the surety, and the Court held that the judgment discharging the principal discharged him.

A surety bond taken as security for the conduct of an agent of a foreign corporation, which undertakes to do business in Pennsylvania without complying with the statutes concerning foreign corporations is invalid.

*McCanna etc. vs. Citizens Trust etc. Co.*, 76 Fed. 420.

For the same reason an express agent's bond was held invalid in

*Daniels vs. Barney*, 22 Ind. 207.

Also a life insurance agent's bond was held invalid in

*Thorne vs. Travelers Insurance Co.*, 80 Pa. State, p. 1.

So also an indemnity bond providing for protection against plaintiff's unlawful act in seizing cattle not belonging to the mortgagor, was held void in

*Rice Bros. etc. vs. National Bank of Commerce* (Mo.) 73 S. W. 930.

The Court says in that case:

"The general principle of law invoked by defendant's counsel to defeat plaintiff's action is well settled. It is that when the consideration for a contract is illegal the contract is void, whether the illegality is disclosed by the contract itself, or is established by evidence outside. *Sumner vs. Sumners*, 54 Mo. 340. In furtherance of this principle, it is also well settled "that any promise, contract, or undertaking the performance of which would tend to promote, advance or carry into effect an object or purpose which is unlawful, is in itself void, and will not maintain an action. The law which prohibits the end will not lend its aid in promoting the means designed to carry it into effect, and in this respect the law gives no countenance to the old distinction between *malum in se* and *malum prohibitum.* That which the law prohibits, either in terms or by affixing a penalty to it,

is unlawful, and it will but promote in one form that which it declares wrong in another. *White vs Buss*, 3 Cush. 448, quoted with approval in *Sprague vs. Rooney*, 104 Mo. 349, 16 S. W. 505."

So in *Mound vs. Baker*, 44 Atl. 346, it is held that a bond given to secure rent under a lease of property leased for the purpose of prostitution, which is unlawful, is void, and no recovery can be had thereon.

The Court in that case said:

"Therefore if this suit was upon the lease itself it could not be maintained. It can be maintained no better on the bond, for when the foundation fails all goes to the ground."

To the same effect is *Riley vs. Jordan*, 122 Mass. 231.

A well considered case from the Supreme Court of Missouri upholds our position in the following forcible language:

"A note was given to plaintiff in consideration of his pasturing one Hudson's cattle therein, most of which land was public domain, which said plaintiff had fenced contrary to law. The defendants who had a mortgage on the cattle guaranteed the note by endorsing it on the back. Held,

" 'As has already been stated that apart of

the care bestowed on Hudson's cattle by plaintiff was by means and use of an unlawful enclosure and the cowboys who maintained such enclosure, we cannot doubt that as to the part of the claim for keeping the cattle in the pasture was illegal and therefore the note must be held to have been given without any supporting consideration. *It is true this action is on the contract of guaranty and not the note, but the law is quite well settled that when the principal obligation is void for illegality that that infirmity will extend to and vitiate the contract of guaranty and will constitute a defense open to the guarantor in action on the guaranty itself.'*

*"On rehearing plaintiff insisted note was issued as result of arbitration of the differences between the parties and the Court said, 'it is out of the power of individuals to legalize that which the law prohibits by executing a contract the consideration of which is the immediate fruit of a prohibited thing.'"*

*Tandy vs. Elmore-Cooper Livestock Com.*, 87 S. W. 614 (Mo. 1905).

*Pittsburg Constr. Co. vs. West Side Belt Railway Co. et al.*, 154 Fed. 929.

The West Side Belt Railway Company was organized to build a railroad and it executed a contract with one Petrie to build the same, and at the same time gave Petrie permisison to sublet the

contract to the plaintiff, on a contract identical with his contract with the Railway Company. The Railway Company and individual defendants became sureties for Petrie on his contract with the plaintiff. The plaintiff was a foreign corporation and had not complied with the statutory requirements for doing business in Pennsylvania State, and its contracts were held therefore to be void.

> "The suit here is against the sureties of the contractor, and the illegal contract the basis of the action. As the plaintiff must rely on its void contract to recover, the action must fail. The test as to whether the action is grounded upon the void contract depends on whether it requires the aid of an illegal transaction to establish the case, and if it be necessary to prove the illegal contract in order to maintain the action, the courts will not enforce it, nor will they enforce any alleged rights springing from such agreements. *Johnson vs. Hulings, supra,* 103 Pa. 501, 49 Am. Rep. 131, *McMullen vs. Hoffman,* 174 U. S. 639, 19 Sup Ct. 839, 43 L. Ed. 1117."

This rule is aptly stated in *Western Indemnity Co. vs. Crafts* (Circuit Court of Appeals, Sixth Circuit, March 6, 1917), 240 Federal, 1, in wihch the Court uses this language:

> "The purpose of the whole transaction being to induce the state treasurer to make a de-

posit in defiance of the law, the indemnity contract is unenforceable because of the illegality of the consideration; the whole transaction being permeated by such illegality.

Every part of the consideration goes equally to the whole promise, and, if any part of it is contrary to public policy, the whole promise falls."

The following cases sustain this doctrine:

*Joyce, Defenses to Commercial Paper*, Sec. 288, 290.
*Thompson, Corporations*, Vol. 3, Sec. 2190,
10 *Cyc.* 1116, Sec. 6.
7 R. C. L. Sec. 678.
32 *Cyc.* 25, 29; 9 *Cyc.* 563; 20 *Cyc.* 1420.
*Williston's Wald's Pollock on Contracts*, p. 491-495.
*Southern Loan Co. vs. Morris*, 2 Pa. St. 175, 44 Am. Dec. 188.
*Dennison vs. Gibson*, 24 Mich. 187.
*Root vs. Goddard*, Fed Case 12037.
*Root vs. Wallace, Fed. Case* 12039.
*Board of Education vs. Thompson*, 33 Ohio St. 321.
*Higgins vs. Quigley*, 54 N. E. 136.
*State vs. Brabtley*, 27 Ala. 44.
*Ferry vs. Buchard*, 21 Conn. 587.
*Shuttleworth vs. Levi*, 13 Bush. (Ky.) 195.
*Ancorn vs. Guillot*, 10 La. Ann. 124.

*Fisher vs. Shattuck*, 17 Pick (Mass.) 252.
*Crum vs. Wilson*, 61 Miss. 233.
*U. S. vs. Tingley*, 5 Pet. 115, 8 L. ed. 66.
*Daniels vs. Barney*, 22 Ind. 207.
*State vs. Vion*, 12 La. Ann. 688.
*Levy vs. Wise*, 15 La. Anna. 38.
*Lancaster Township vs. Graves*, 96 N. E. 172.
*Henry & Co. vs. Fry*, 137 N. Y. Sup. 894.
*Woodson vs. Batnett*, 2 Hen. & Mun. 80, 3 Am. Dec. 612.
*Trent Importing Co. vs. Wheelwright*, 84 Atl. 542.
*Luce vs. Foster*, 60 N. W. 1027.
*H. Koehler & Co. vs. Reinheimer*, 45 N. Y. Sup. 337.
*Hill vs. Smith, Morris* (Iowa) 102.
*Day vs Spiral Spring Buggy Co.*, 23 N. W. 628.
*Cahill vs. Golman*, 146 N. Y. Sup. 224.
*Forsyth vs. Woods*, 78 U. S., 11 Wall. 484. 20 L. Ed. 207.
*Cobbs vs. Nixon*, 42 N. W., 808 (Mich.)
*Ramsey's Estate vs. Whitbeck*, 56 N. E. 322.

It must be apparent to the Court from reading the above cases that no recovery can be had in any event against the individual defendants. It would be a strange proposition if the Court should hold, which it seems to us it must, that the contract of guaranty of the Commonwealth Company, and

the mortgage securing the same were illegal and void, and no recovery could be had thereunder, but that a recovery could be had against the individual defendants on their guaranty, when the basis of such recovery must be an illegal and void contract. The Court would say in one breath there could be no recovery against the Commonwealth Company, because its contract is prohibited by law, but in the next breath we will allow a recovery against the individual sureties as guarantors of this contract, which is prohibited by law. No such recovery in our opinion could be upheld in either law or equity.

## CONTENTION OF APPELLANT ON LIABILITY OF INDIVIDUAL DEFENDANTS.

Appellant's claim in this connection is found on pages 88 to 92, inclusive, of its brief.

Counsel for appellant again fails to distinguish between a contract *ultra vires*, of a corporation, and one illegal and prohibited by law. They refer in their argument to the contract of a minor and a married woman, or a natural person under disability. Those instances are not parallel with the contract of guaranty of the Commonwealth Company and the individuals in the case at bar. The disability of a minor is one that he can take advantage of or not, as he sees fit. The disability of a married woman, or a natural person under a similar disability is one they can take advantage of or not, as they see fit. The want of power of a

corporation to make a contract is one it and its stockholders can take advantage of or not, as it sees fit. Not so, however, with a contract forbidden by law. That cannot be waived. The Court itself will see to it that if it is forbidden by law it will not be enforced. It isn't a mere want of power of the Commonwealth Company to enter into this contract, it is the fact that it was forbidden by law, was illegal, and as shown by the cases hereinbefore cited, if the contract of the Commonwealth Company was forbidden by law and illegal, that taints and makes the contract of the individual sureties illegal and unenforceable.

We will concede for the sake of argument that if the contract of guaranty signed by the Commonwealth Company was *ultra vires*, it would not release the individual guarantors, but our contention is that the contract of guaranty of the Commonwealth Company being illegal and prohibited by law, there can be no recovery in any event against the individual guarantors.

Counsel for appellant in their brief cite the case of *Backus vs. Feeks*, 71 Wash. 508. That case simply holds as follows:

> "Sureties in a bond guaranteeing the performance of a contract, which is not illegal or immoral, are bound by their guaranty, although the contract cannot be enforced against the principal."

This is the statement of a principle that is maintained by all the authorities, and we have no contention to make in that regard. Here again was a case where the defendant could take advantage of the disability or not, as he saw fit.

Reliance is also placed by appellant upon the English case of *Yorkshire Ry. Wagon Co. vs. McClure*, 19 Ch. D. 478, 51 L. J. Ch. 259. The Supreme Court of this State in the Backus case refers to that case and says:

> "In the McClure case it was held that the lender may recover against the surety, although the loan was made to a railway company, which could not borrow."

It appears in that case that the railroad company had exceeded its authority for borrowing money, and in that case the Court says:

> "It was argued by his (defendant McClure) counsel that * * * the transaction was *malum in se* * * *I see no reason for believing that the directors did anything *malum in se*."

> "Upon the whole case I hold that the transaction was a borrowing by the railway company, and an attempt to give a security for the loan on the rolling stock, and that this so far as the company was concerned was ultra vires, and void. I must therefore dismiss the action against the company."

The Court then held the sureties liable.

The same distinction is recognized in the latter English case of *In re Birkbeck Permanent Building Society* (1912) C. A. (2 Ch. Eng. 232).

The case of *Remsen vs. Graves*, 41 N. Y. 471, cited by plaintiff was also a case holding sureties on an *ultra vires* contract.

Appellant in its brief on page 92, quotes a portion of Section 63 (p.334), of Brandt on Suretyship and Guaranty. The part quoted sustains our contention, because the author says:

> "He (the surety) has the right to oppose all which are inherent to the debt."

The contract of guaranty in the case at bar is the debt, and under Brandt we have the right to defend as to all which is inherent to the debt. The debt itself is illegal; is prohibited by statute; therefore that illegality is inherent to the debt, and we have a right to defend. It is interesting, however, to read further of this same section in Brandt on Suretyship and Guaranty, in which he uses the following language:

> "Prothier distinguishes them into exceptions in personam and exceptions in rem. The latter, which go to the contract itself, such as fraud, violence or whatever entirely avoids the obligation, may be pleaded by the surety; but the former, which are grounded on the

insolvency or partial solvency of the debtor, or which result from a cession of his property, or are the consequences of his minority, cannot be opposed to the creditor. Where a statute prohibited the making of a particular kind of note by a bank, it was held that such a note was void, and a guaranty of the note was likewise void. Where property of the principal sufficient to satisfy the debt was levied on, it was held that such levy satisfied the debt as to the principal; and consequetly as to the surety. The Court said: 'It would be as difficult for me to conceive of a surety's liability continuing after the principal obligation was discharged as of a shadow remaining after the substance was removed.' A justice of the peace required two parties who were before him for examination to enter into a joint recognizance with surety when he had no right to require a joint obligation from both, but had power only to require a several recognizance from each. Such a joint recognizance was given, and it was held that it was void as to the principals and consequently as to the surety. The court said: 'It is a corollary, from the very definition of the contract of suretyship, that the obligation of the surety being accessory to the obligation of the principal debtor or obligor, it is of its essence that there should be a valid obligation of such principal, and that the nulity of the principal obligation necessarily induces the nulity of the

accessory. Without a principal there can be no accessory. Nor can the obligation of the surety, as such, exceed that of the principal.' "

Again appellant refers to section 17 (p. 352), Brandt on Suretyship and Guaranty. Let us quote a portion of the section:

"Where a party becomes the surety of a married woman, an infant, or other person incapable of contracting, he is bound, although the principal is not. With reference to this it has been said that: 'Fraud, illegality or mistake, which may rescind the contract of the principal, induces the discharge of the sureties; but if the invalidity of the contract rests upon reasons personal to the principal, in the nature of a privilege or protection, the principal requires a personal defense against the contract,' but the contract subsists, and the sureties may be charged thereon. The disability of the principal may be the very reason why the surety was required."

The author says, "that illegality which may rescind the contract of the principal induces the discharge of the sureties," exactly what we maintain in this action.

The case of *Jorguson vs. Apex Gold Mines Company*, 74 Wash. 243, hereinbefore cited, holds:

"A bond by a corporation guaranteeing dividends in an amount equal to the amount paid for the stock, makes the stock subscription a ficti-

tious one and violates Article 12, Section 6, of the Constitution prohibiting the issuing of stock, except to bona fide holders for full value."

In that case the corporation signed not only the contract, but also the bond, and the contract was held to be void as against public policy, and in violation of Remington & Ballinger's Code, Section 3697, and the bond was held to be void for the reasons above stated.

In the opinion in the Apex Gold Mine case the Court cites with approval the case of *Smith vs. Alabama Fruit Growing & Winery Assn.*, 26 So. 232, and uses in that connection the following language:

> "We have found one case where the facts are so similar that it would be useless to attempt to distinguish them: *Smith vs. Alabama Fruit Growing & Winery Assn.*, 123 Ala. 538, 26 South 232. The corporation there sold to the plaintiff $1,500 worth of its capital stock, and executed its bond with sureties that it would return the $1,500 in four semi-annual dividends. These dividends were not paid, and action was brought upon the bond. A demurrer was interposed to the complaint upon the grounds (1) that the contract was illegal and void, in that it undertook to indemnify plaintiffs against loss for a purchase of stock, making issue thereof fictitious and without consideration; (2) that the contract was in violation of the consti-

tution prohibiting corporations to issue stock or any bond for the payment of money except for money, labor done, or property actually received, and declaring void all fictitious increase of stock; (3) that it appeared from the complaint that the contract sued upon was illegal, without consideration, and void. This demurrer was sustained, and on appeal the Court, in affirming the judgment, said:

" 'It requires little, if indeed anything, beyond this statement of the case to demonstrate the correctness of the city court's ruling. The contract sued on is, of course, executory, and its enforcement is sought in this action in furtherance and completion and consummation of a fictitious subscription to the capital stock of a corporation, a transaction prohibited by the organic law of the land and frequently denounced as vicious and incapable of conferring or passing any rights. The jurisdiction of our courts cannot be invoked to enforcement and execution of such undertakings. In substance the contract is for the payment back by the corporation to the subscriber for its stock of the money he subscribed, thus leaving the issuance of the shares to him wholly unsupported by any consideration, fictitious and void; and the action upon the contract is an invocation of the powers of the courts to the accomplishment of this end expressly forbidden

by the constitution of the State. If this could be done an easy road would be opened to the utter emasculation of this most just and necessary provision of the constitution by evasions so palpable as to be little, if at all, short of avowed and direct attempts to defy and override it.' "

In the Alabama case, it will be noticed that there were individual sureties on the bond, and they were released together with the principal, on account of the illegality attaching to the transaction, a case on all fours with the case at bar.

An interesting and instructive case on the distinction between the liabilities of sureties on *ultra vires* contracts and illegal contracts of a corporation is *Shaun vs. Brandt*, 82 Atl. 551. The distinction between an *ultra vires* contract, and a contract prohibited by law is so lucidly set forth in the opinion that we quote from page 553, as follows:

"The appellant contends, however, that the rule stated cannot be applied in this case because the suit is against the surety, who is estopped from denying the authority of the principal to execute the bond, and he cites authorities supporting the proposition that the execution as surety of a bond given by a corporation estops the surety from denying the existence of the corporation or its authority to make the bond. But this contention entirely

overlooks the distinction between an ultra vires contract and a contract based upon illegal consideration. In *Md. Trust Co. vs. Mechanics' Bank, supra,* Chief Judge McSherry says: 'Ultra vires and illegality represent totally different ideas. *Bissell vs. Railroad,* 22 N. W. 269. Ultra vires contracts are, strictly speaking, only those which are defective solely because they are beyond the power of the corporation, when they involve some adventure or undertaking not within the scope of the charter, which is the rule of its corporate action. *Leslie vs. Lorillard,* 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456. If the contract is illegal as in violation of established principles of public policy, it cannot, of course, be enforced. 2 Page on Contracts, Sec. 1084, and the like result will follow if the contract is repugnant to the Code.' The distinction is also recognized in the case of *Burke vs. Smith, supra,* where it is said: 'All the cases distinguish between an ultra vires act and one that is unlawful and illegal. In certain cases an indorser may be held upon a note, the consideration of which is based upon an ultra vires act, but a contract to do an illegal and one against public policy is held to be a contract of "evil tendency" and unenforceable. *Emerson vs. Townsend,* 73 Md. 224 (20 Atl. 984); *Hanauer vs Doane,* 12 Wall. 342 (20 L. Ed. 439) *Lester vs. Bank,* 33

Md. 562 (3 Am. Rep. 211), *Md. Trust Co. vs. Mechanics' Bank*, 102 Md. 616 (63 Atl. 70); *Black vs. Bank of Westminster*, 96 Md. 399 (54 Atl. 88).' In 27 *Ency. of Law* (2d Ed.) 442, it is stated: 'A person cannot bind himself as surety in an obligation executed in violation of an express statute, nor can he evade the spirit of the law by doing indirectly what he is forbidden to do directly. The contract must not be opposed to public policy.'"

See also 32 *Cyc.* 29.

Counsel for plaintiff in their brief discuss this proposition as though the act of the Commonwealth Company in signing its contract of guaranty was ultra vires only, and not prohibited by positive law.

The cases cited by appellant on page 92 of its brief are cases where the contract was *ultra vires* only.

Again we cannot find language which seems seems to us more fully supports the contention of appellees in this case, and entirely refutes the contention of appellant, than that found in the opinion of the Lower Court on page 167 of the Record, as follows:

"The Foggs and Gove executed a guaranty of the guaranty of the Comomnwealth Company in the following language:

" 'The undersigned, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, in consideration of the acceptance of the foregoing guaranty and agreements by the said Traders' Trust Company of Oregon, and other valuable considerations do hereby agree and guaranty to and with the said Traders' Trust Company that the foregoing guaranty and each and every part thereof, is based upon a valuable consideration sufficient in law to bind the Commonwealth Company, and that the same is a valid and subsisting obligation of said Company.'

"Having held that the guaranty of the Commonwealth Company was invalid as a direct violation of the constitutional prohibition of the state, above set forth (Article XII., Sec. 6), and not merely *ultra vires*, it follows that the guarantee of these individuals, in contravention of its public policy, is also invalid. Such a prohibition cannot be waived. *Jorguson vs. Apex Gold Mines Company*, 74 Wash. 243; *Smith vs. Alabama Fruit Growers' & Wine Association*, 26 So. 232; *Ramsey's Estate vs. Whitebeck*, 56 N. E. 322; *Schaun vs. Brandt*, 82 Atl. 551; 32 Cyc. 29; *McMullan vs. Hoffman*, 174 U. S. 639; *Cory vs. Griffen*, 63 N. E. 420."

## ESTOPPEL.

The appellant on page 80 of its brief, makes the astounding claim that the Commonwealth Company, its stockholders, and the Foggs and Gove, are estopped from pleading the illegality of the Comomnwealth guaranty, and the mortgage securing the same, and the individual guaranty of the individual defendants. One of the reasons for such estoppel is claimed that the stockholders of the Commonwealth are estopped "first, by accepting the cancellation of the old mortgage, and the surrender of the old series of notes." The evidence shows that the T. I. & I. Company of Tacoma was the corporation that accepted the cancellation of the mortgage, and the old series of notes, instead of the Comomnwealth Company. However, in any event there can be no estoppel as to either the corporation, the Commonwealth Company, its stockholders, or the individual defendants.

It is true that in some cases the stockholders of a corporation, and the corporation may be estopped from defending against an *ultra vires* act of the corporation, but the principle is well established by all the Courts that there is no such estoppel as to a contract, which is opposed to established prinicples of public policy, or based on an illegal consideration, or forbidden by statute or constitutional law.

This principle is upheld in all of the cases cited

by us under the discussion of the liability of the corporation of the Commonwealth Company and the individual defendants, but in addition to those authorities we cite the following:

> *Schaun vs. Brandt*, 82 Atl. 551.
> *Lewis vs. City of Shreveport*, 108 U. S. 282; 27 L. Ed. 728.
> *Martin vs. Zellerbach*, 38 Cal. 301, Op. 310.

The argument of the appellant under the head of "Estoppel," is simply another outgrowth of its failure to distinguish between an act simply *ultra vires of* a corporation, and an act prohibited by law, and needs no further discusison.

## THIRD.

## LIABILITY OF T. I. & I. COMPANY OF TACOMA.

The argument and authorities cited in this brief to show the non-liability of the Commonwealth Company apply with equal force to our contention that there is no liability even on the part of the T. I. & I. Company of Tacoma in this action.

The transactions of December, 1909, whereby the T. I. & I. Company of Tacoma took over the T. I. & I. Company of Washington, and whereby Franklin Fogg took over the abstract plant of the Wilson Company and eliminated that from operation, were all part and parcel of an illegal scheme to monopolize the abstract business in Pierce

County, Washington. The real plaintiffs in this action, Smith and Willoughby, were parties to that, and had knowledge of its object. All the negotiations which led up to, and the final execution of the instruments of December 2, 1911, show that they had for their purpose the monopolization of the abstract business in Pierce County, Washington, Smith and Willoughby, the real plaintiffs in this action, were parties to all of those transactions, and benefitted thereby, and no one can read the testimony in this case without being convinced that they, Smith and Willoughby, well knew the object of the execution of the instruments on December, 1911, the boxing up and shipping of the abstract plant to Portland, and well knew that the dominant purpose of all of the transactions from December 1909 down to December 1911, was to restrain trade and competition in the abstract business, and to create a monopoly of such business in Pierce County, in the hands of the stockholders of the Commonwealth Company. Suppose everyone interested in these transactions had gone on the witness stand and testified that that was not the purpose of these transactions, would the Court for a moment believe it? The mere recital of the facts of what was actually done, and the reading of the documents executed must impress any open-minded man that the sole object of all of these transactions was this unlawful purpose. How then can there be a recovery against the T. I. & I. Company of Tacoma? The instruments

executed by it are stamped and branded with this illegal purpose and design, and under all of the authorities the Court can grant no relief against any of the defendants herein, but must leave the parties where it finds them, however onerous or burdensome to some of them this ruling may be, for the reason, as is stated in many of the authorities above cited, the rights of the individuals are subservient to the rights of the public.

As was said in *Continental Wall Paper Co. vs. Voight & Sons*, 212 U. S. 227 (53 L. Ed. 486), quoting from *McMullen vs. Hoffman*, 175 U. S. 639-654-669 (43 L. Ed. 1117-1123-1128):

> " 'The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract,' citing many English and American cases. 'The Court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the en-

forcement of his alleged rights under it tends strongly toward reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law.' In that case the principle announced in *Coppell vs. Hall*, 7 Wall. 542, 558, 19 L. Ed. 244, 248, was reaffirmed, namely:

"Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Whenever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation.' "

In *Fields vs. Holland*, 1915 C. L. R. A. 865-870, 165 S. W. 699, the Supreme Court of Kentucky had under consideration a contract in restraint of trade and monopolization of the transfer business.

One of the parties had paid to the other Fifteen Hundred Dollars as a part of his consideration for entering into this contract, and also as a part consideration for his keeping out of business, it was claimed in the complaint that the other party had violated the contract, and the party who had made payment as aforesaid brought suit for an injunction enjoining the other party from carrying on the business, and in the event that an injunction should not be granted, that he recover back his Fifteen Hundred Dollars paid, and in event that should not be granted that he recover damages for breach of the contract. The Court held against him on all these propositions, refusing an injunction, refusing him the recovery of the Fifteen Hundred Dollars paid, or any damages, saying in that connection:

> "If correct in this view, it further follows that the Circuit Court did not err in refusing to rescind the contract, or to award appellants damages for its breach by appellees, for it is a well recognized rule that the courts will not grant relief to the parties to an illegal contract, or allow a recovery of damages by either against the other for its breach. The contract being against public policy, and the parties in *pari delicto*, no right of action can be predicated thereon by either of them. They will be left by the Court where their own conduct placed them. *Ratcliffe vs. Smith*, 13 Bush, 172; *Chesapeake & O. R. Co. vs. Maysville*

*Brick Co.*, 132 Ky. 643, 116 S. W. 1183; *Hancock vs. Louisville & N. R. Co.*, 145 U. S. 416; 36 L. Ed. 757; 12 Sup. Ct. Rep. 969; *Harriman vs. Northern Securities Co.*, 197 U. S. 244, 49 L. Ed. 739, 25 Sup. Ct. Rep. 493."

This principle is so well stated in 6 *Ruling Case* Law, Sec. 218, page 823, that we feel compelled to quote the same, although we may be subject to criticism for being too prolix:

"The rule which limits the enforcement of rights growing out of illegal contracts to cases in which the action may be maintained independently of the contract is generally applied where an illegal contract is sought to be enforced by a plaintiff who, with respect to the contract in question, is as guilty as the defendant. Except when public policy requires that relief should be given to such plaintiffs, the courts almost invariably apply the maxim *potior est condito defendentis et possidentis.* As between parties *in pari delicto* the courts ordinarily will not enforce an illegal contract or any supposed rights growing out of it. The rule is often expressed by saying that in such cases the law will leave the parties where it finds them. This view of the question, it seems, is not satisfactory to some very able and very just minds, because it permits a party to plead his own wrong or infamy, as the case may be, and thereby obtain

an unconscientious advantage over his adversary, from whom he has perhaps received some valuable consideration for the execution of the instrument the payment of which he resists. This is undoubtedly true; but it is equally true that the law does not undertake in such cases to settle any question of conscience as between the parties. The courts are called upon to perform a higher duty than to settle questions of honor between wrongdoers; they are to protect society from the influence of conntracts made in disregard of the public weal. The parties to such a contract are presumed in law to know its character when they enter into it. If they speculate upon the chances of the failure of the government whose laws they disregard and whose authority they condemn, they must learn that the law cannot respect that which is illegal, and that courts will never give effect to a contract which looks, however remotely or contingently, to the destruction of the government. The Court refuses to enforce such a contract, and it permits the defendant, to set up its illegality, not out of any regard for the defendant, but only on account of the public interest. It has often been stated that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed because public policy requires its allowance the

better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. It is somtetimes said that this is a defense which the guilty is allowed to set up against his associate in guilt, as a sort of a punishment for the participation of the latter in the violation of law. Such are the reasons which support the general proposition that whichever party has to resort to setting up the illegal transaction in order to establish or support an affirmative claim of right must lose. Where the parties are in *pari delicto* no affirmative relief of any kind will be given to one against the other. The only equitable remedies which they can obtain are such as are purely defensive. While an unlawful contract the parties to which are in *pari delicto* remains executory, its invalidity is a defense in a court of law, and a court of equity will order its cancellation or enjoin the enforcement of security *only* as an equitable mode of making that defense effectual, and when necessary for that purpose. The rule denying a remedy to a person in *pari delicto* will not prevent equitable relief against the enforcement of the power of sale in a mortgage which is against public policy."

## FOURTH.

### CONTENTION OF APPELLANT ON THE CLAIM OF APPELLEES THAT ALL THE TRANSACTIONS OF 1909 AND 1911, ARE VOID AND NON-ENFORCEABLE AS BEING AGAINST PUBLIC POLICY, IN RESTRAINT OF TRADE AND COMPETITION, AND TENDING TO FORM A MONOPOLY.

In view of the fact that appellants' counsel all through their brief claim that the transactions of 1909 were simply a straight sale of the plant and goodwill of the T. I. & I. Company of Washington, and that the transactions of December, 1911, were simply a change of the indebtedness of the T. I. & I. Company, and a change of security, and that if a monopoly in the abstract business was formed or contemplated, Smith and Willoughby had no part in it, did not participate in it, and knew nothing about it, we think it best to briefly state the situation of the abstract business prior to December 7, 1909, and subsequent thereto, and state briefly the transactions from 1909 down to December, 1911, for the purpose of showing that not only were Smith and Willoughby aware of the formation of the monopoly, but helped form it, participated in it, were benefitted by it, and that the dominant purpose of all the parties was to form a monopoly of the abstract business in Pierce County.

Prior to December 7, 1909, the T. I. & I. Company of Washington, the Commonwealth Company, and the Wilson Company were each engaged in the abstract business in Pierce County, and were carrying on said business in active and actual competition with each other, and controlled the abstract business. That the competition between said companies was very keen, and they were cutting prices. Something had to be done to keep up the prices. It is fair to presume from all of the evidence, and the actions of the parties that the Foggs, Willoughby and Smith had discussed this situation with the end in view of remedying it. We find them for some days prior to December 6, 1909, negotiating the sale of the abstract plant of the T. I. & I. Company of Washington, to a corporation to be formed. They took the next step pending these negotiations on the 6th day of December, 1909, when Willoughby and Franklin Fogg leased of the Wilson Company its entire abstract plant and put it out of business in Pierce County.

We desire to call particular attention to the provisions of that lease, which is attached to the stipulation on file here marked Exhibit "A," Record, p. 100. For what purpose did Willoughby and Fogg lease that plant and put it out of business? It could have been for no other purpose than to restrain trade and competition, and as a step to the formation of a monopoly in the abstract business. What interest did Willoughby have in

assigning said lease the next day to Fogg? He received nothing for it, but by that time the negotiations for the sale of the T. I. & I. Company's plant had been consummated, and he knew that the assignment of that lease to Fogg, the sale of the T. I. & I. Company's plant to the new corporation was for the purpose of, and did actually form a monopoly of the abstract business in Pierce County, and Smith and Willoughby were parties to the same, participated in it, and helped form it.

It seems to us it is useless to say that the only thing that Smith and Willoughby did was to sell their plant and goodwill, and that they had no knowledge of, and did not help form the monopoly.

On December 7, 1909, the T. I. & I. Company of Tacoma having been incorporated by Mr. Willoughby, with himself as its President, and a subscriber to Forty-eight Hundred of Five Thousand Dollars of the capital stock, purchased the plant and goodwill of the T. I. & I. Company of Washington, for One Hundred Thousand Dollars, of which Ten Thousand Dollars was paid in cash, and notes for Ninety Thousand Dollars, secured by a mortgage upon the plant purchased, a copy of which mortgage is attached to the defendants' answer marked Exhibit 1, Record p. 50.

It was recognized that it could afford no security other than the plant itself. The purchase price notes for Ninety Thousand Dollars, and the mort-

gage given to secure the same, were all executed by Mr. Willoughby as president of the company, and it is provided in the mortgage that Smith and Willoughby should have joint control with the T. I. & I. Company of Tacoma, of this plant. This consummated the monopoly of the abstract business in Pierce County in the hands of the Foggs and Gove, with Mr. Willoughby as an active participant and a supervisor of the property and conduct of the T. I. & I. Company of Tacoma. The T. I. & I. Company of Tacoma with the capitalization of only Five Thousand Dollars had only that amount at stake, while Smith and Willoughby had Ninety Thousand Dollars, a substantial interest in the property controlled by the monopoly, and a substantial interest in seeing to it that the monopoly succeeded in the purposes for which it was formed, i. e., the monopolization of the abstract business in Pierce County.

Under this state of facts can it be said that Smith and Willoughby did nothing but sell their plant? Such a statement, it appears to us from the record, is an insult to an intelligent person. Smith and Willoughby's interests had a mortgage on the only property owned by the T. I. & I. Company of Tacoma, and they could only hope to realize on this large amount of indebtedness by the success of this monopoly. They were interested in it to this extent, that it must succeed in order to pay them.

The T. I. & I. Company of Tacoma, as it was compelled to do under its mortgage, conducted an abstract business presumably satisfactory to Smith and Willoughby, and under their supervision with Mr. Gove as vice president, and in active management of it, and it, and the Commonwealth Company did all the abstract business in the county, the Smith and Willoughby's and the Foggs and Gove having succeeded in forming a monopoly of that business.

In the latter part of 1910, the Tacoma Title Company, managed by Mr. Lehmon, entered into the abstract field in the county, and commenced to interfere with the plans of the monopoly, and to take some of its business, and on July 22nd, 1911, we find Mr. Fogg writing to Mr. Willoughby concerning the situation. This letter is found in the sixth paragraph of the stipulation on file, and to a part of it we desire to call the Court's attention particularly:

"Mr. A. D. Willoughby,
Portland, Oregon.

Friend Willoughby:

The abstract business is now so poor that some new plan must be made, as there is not enough business to even pay the running expenses of the two plants, and in addition to that, the new man is coming into active competition and must be headed off before he has a chance to build up a good plant. If you will

give us your share of help, we will still try to pull the thing out O. K., as almost any revenue derived will be more than could be had by fighting him and each other, too. After considering a good many plans, this one seems to be the best."

Record, p. 79.

Mr. Fogg then suggests a plan of increasing the capital stock, and giving Smith, Willoughby and Wilson a share of the stock, and later in the letter says:

"Our interests here are mutual and must be worked out together or both plants would be operated at a loss, for the benefit of the public. Our idea would be to work into title certificates as fast as possible and use every effort to put new additions under the certificate system, and once under a certificate, that addition would be out of reach of any other company. By working for the first few years to keep the field clear rather than to make anything more than interest on the investment, we would have in the course of five or ten years, a business that would be almost out of the line of competition, both on account of the cost of another plant and by that time, we would have a large part of the titles under certificate system."

Record, p. 81.

Between the receipt of that letter and August 3, a plan was suggested by Mr. Willoughby to the Foggs, but the evidence is silent as to what that plan was, but under date of August 3, Horace Fogg again wrote Mr. Willoughby, which letter is also contained in Paragraph six of the stipulation, part of which letter is as follows:

"Dear Mr. Willoughby:

I am afraid our ideas are too far apart to do us any good. The situation here is so bad that we must have some relief or drop out of our present deals. The plan you suggested would not relieve us any, but would in fact make it far more binding on us, and if we are not able to make enough money to pay the amounts due under the present plan, we would not be able to do so under your plan."

* * * Whether or not any deal is made with you or Wilson, the rate will have to be cut to seventy-five cents and we expect to do that at once and with the intention of making it a permanent rate. We can pay expenses at fifty cents if we get most of the business and both Frank and Mr. Gove thought it the best plan to come back to our own company and make a permanent rate of fifty cents and not try to buy the other plants as long as there was a fourth man in the field whom we had to fight anyway, but I thought I would take it up with

you first and get your ideas on the matter before we did anything."

Record, p. 81-82.

If the English language means anything at all, these letters show that the monopoly was commencing to slip, and it was the intention of the Foggs and Gove to do whatever was necessary to maintain that monopoly. They consulted with Willoughby and Smith, who were vitally interested in the success of the monopoly, as to the best manner of suppressing the new man and sustaining the monopoly, and plans were submitted back and forth for that purpose.

The T. I. & I. Company of Tacoma, who owed the indebtedness secured by a mortgage on the plant, had nothing to pay with, except the earnings of the plant, and according to the evidence the earnings of the plant were falling off, so that the prospect not only for Smith and Willoughby to get their money, but the prospect of maintaining the monopoly looked dark indeed. That was fully understood by Smith and Willoughby, as is shown by the letter of August 7th, 1911, written by Willoughby to Horace Fogg, which is also contained in Paragraph six of the stipulation, in which he says:

"Dear Sir:

Your letter of August third relative to the abstract situation at Tacoma has been received.

We understand the condition of the abstract business in Tacoma and are ready to give our assistance to any proposition that will relieve the situation, provided our interests are fully protected. *Would rather take the plant back and operate it* than to go into a proposition whereby we would be a minority stock holder and therefore have nothing to say in the management of the company.

I expect to be in Tacoma within the next two weeks and will then talk over with you any scheme you may have that will be of mutual benefit to us all."

Record, p. 83.

It is apparent from this letter that if some plan was not formulated satisfactory to the Smith and Willoughby interests they would foreclose their mortgage, take back the plant and operate it, and thus dissolve the monopoly, which the Foggs and Gove did not want done, neither did Smith and Willoughby, if it could be operated so as to pay their indebtedness.

Even at this time they say in their letter, they would not go into any deal, unless they could have something to say in the management thereof.

The dullness in the abstract business continued, and the T. I. & I. Company of Tacoma were not able to make its payments, and an installment of interest was to become due on the 7th day of

December, 1911, amounting to $2,800.00, and an installment of principal of $5,000.00, which the T. I. & I. Company of Tacoma could not pay, and in default of which the mortgage could be foreclosed, and the plant sold thereunder, which would result in but one thing, that either the plant would be taken by the Willoughby and Smith interests, and they would engage in business here, or it would be sold to some other party who would enter into business in competition with the Comomnwealth Company, a result which the testimony fairly shows was not desired by any of the parties. It is true that Smith and Willoughby testified that they had never threatened to foreclose this mortgage, but Willoughby says in his letter above referred to, that if an arrangement satisfactory to him is not made he would take the plant back and operate it. It is fairly deducible from the testimony that they came to Tacoma about December 1, for the purpose of making some new arrangement satisfactory to them, or else foreclose the mortgage. What was the situation then on December 1, 1911?

The T. I. & I. Company of Tacoma was practically insolvent; it could not pay what was due on the mortgage; the Smith and Willoughby interests were saying, make some arrangement satisfactory to us or we will foreclose and put the plant back in business; all parties were anxious to prevent that being done; were anxious in other words to not only continue, but to make such ararnge-

ments as would bolster up and solidify the monopoly in the abstract business. These negotiations lasted several days and finally culminated in the T. I. & I. Company of Tacoma executing new notes and a new mortgage securing the same for the balance due on the mortgage indebtedness, the time of payment being extended, and the old notes and mortgage being cancelled and given up to the T. I. & I. Company.

For the first time then the Commonwealth Company appears on the scene, and executes its contract of guaranty wholly without any consideration whatever, except that boxing up and removing from the danger of competition the T. I. & I. Company's plant, shipping the same to Portland where there would be no danger of it being used in competition in Pierce County, having it stored in a safe deposit vault under the joint control of Smith and Willoughby and itself, and the further consideration of Smith and Willoughby executing the agreement of December 2, 1911, whereby they agreed not to enter into the abstract business in Pierce County. This was all done by the consent and agreement of Smith and Willoughby, and was one of many transactions in which they had a hand looking towards the monopolization of the abstract business. What interest was it to the Commonwealth Company that this plant was shipped out of the State, except to remove it from competition? What interest was it to Smith and Willoughby to ship it out of the State

and put it in cold storage? None, except that it helped the Commonwealth Company maintain its monopoly. It is useless to say that it was better security boxed up in Portland than it was as a going concern in Tacoma. As far as the security on the plant was concerned it was weakened by the act of moving it to Portland, and no conclusion can be drawn, except that it was done for the sole and only purpose of aiding the Commonwealth Company in maintaining a monopoly in Pierce County.

The Court must bear in mind that there was no sale of the abstract plant to the Commonwealth Company. The Commonwealth Company did not owe the T. I. & I. Company a dollar; received absolutely no consideration, except as above stated, for the execution of its contract of guaranty. This contract of guaranty, in other words, was simply a hiring of Smith and Willoughby to stay out of business in Pierce County, which is condemned by all the authorities, and is fully argued under the second sub-division of the first paragraph of this brief.

Can anyone say, after reading this record, that Smith and Willoughby did nothing but sell their plant? Can anyone say that they were not among the prime movers in the formation of this monopoly? Can anyone say that every transaction entered into between Smith and Willoughby and the other parties was not each one a transaction having for its purpose the formation of a monopoly ? Can any-

one say that the dominant purpose of all the parties to these different transactions was not the formation of a monoply, and the restraint of trade and competition in the abstract business? It seems to us not.

## TRENTON POTTERIES CASE.

Appellant's counsel in their brief rely largely on the case of *Trenton Potteries vs. Oliphant,* 68 N. J. Eq. 507, 43 Atl. 728, as authority in support of their contention, that even though all the transactions did produce, or tend to produce a monopoly, the various contracts should be upheld.

This case was a case where the Trenton Potteries Company was a corporation formed for the purpose of taking over the different pottery manufacturers in New Jersey, and elsewhere, and it did buy up the different pottery companies and formed a monopoly of the pottery business. Certain of the manufacturers who sold to the corporation, and agreed not to go into business again did start in business, and they were enjoined. It was contended that the transactions were void, as being in restraint of trade, and forming of a monopoly. The lower court held this to be true, and dismissed the bill.
(39 Atl. 923.)

The Supreme Court, however, reversed the decision of the lower court, and held the contracts enforceable in part, and used the language quoted on page 29 of appellant's brief:

"A person engaged in any manufacture or trade, having the right to acquire and possess property, and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his business was large enough to enable him to buy the business of all competitors, the last purchase would completely exclude competition, at least for a time. But in the absence of legislative restrictions, if such could be imposed, upon the acquisition of such property, and its use when so acquired, courts could impose no such limitations. They would be applied to enforce such contracts notwithstanding the effect was to diminish, or even to exclude competition * * * It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish, or for a time at least, destroy, competition. Contracts for such purchases cannot be refused enforcement."

At the outset we desire to call the Court's attention to the expression of the Supreme Court of New Jersey in its opinion in this case on page 729, of 43 Atlantic, in which it says:

"But in the absence of *legislative restrictions*, if such could be imposed upon the acqui-

sition of such property, and its use when so acquired, courts could impose no limitations."

The State of New Jersey neither by constitutional provision nor legislative enactment prohibited monopolies, or prohibited corporations from buying up competing corporations and forming a trust or monopoly. In fact it was the home of all the big trusts and monoplies of the United States, and the Court on that same page recognized the liberal corporate authority given to corporations, where they use the following language:

> "Corporations, however, may lawfully do any acts within the corporate powers conferred on them by legislative grant. Under our liberal corporation laws, corporate authority may be acquired by aggregation of individuals, organized as prescribed, to engage in and carry on almost every conceivable manufacture or trade. Such corporations are empowered to purchase, hold and use property appropriate to their business. They may also purchase and hold the stock of other corporations. Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. The legislature might have withheld such powers, or imposed limitations upon their use. In the absence of prohibition or limitation on their powers in this respect, it is impossible for the

courts to pronounce acts done under legislative grant to be inimical to public policy."

That case can hardly be held to be an authority in the State of Washington where the constitution in the most solemn manner prohibits monopolies. If a like provision to that of the State of Washington had been a part of the constitution or statute of New Jersey, that decision would never have been rendered. Aside from the constitutional provision of the State of Washington, its policy has never been so notoriously favorable to the organization of trusts and monopolies as the State of New Jersey. It is a significant fact that trusts and monopolies have been fostered to such an extent in New Jersey that President Wilson when governor of the State of New Jersey had acts passed greatly limiting the powers of corporations, and crippling the trusts and monopolies that had flourished in that state, and we opine that if this question should now come up before the Supreme Court of New Jersey a different decision would be rendered, because of "legislative restrictions."

We submit, however, that aside from legislative or constitutional restrictions this case is opposed to the great weight of authority, and that under the common law contracts such as were made in the Pottery case, would not be upheld as being both in restraint of trade and competition and forming a monopoly, and for that reason against public policy.

We have heretofore cited the case of *Merchants Ice & Cold Storage Co. vs. Rohrman*, 30 L. R. A. (N. S.) 973, 128 S. W. 599. That decision was rendered by the Supreme Court of Kentucky in 1910, eleven years after the Trenton Pottery case, and in that case, after quoting the opinion of the Supreme Court of New Jersey in the Trenton Pottery case, uses the following language on page 981:

> "And it must be admitted that this case fully sustains the contention of counsel, and if recognized as authority by the us would uphold the contract here sought to be enforced. But we cannot give our approval to the doctrine announced by the New Jersey court. It is not only entirely at variance with our public policy as often declared both by the legislative and judicial departments of the State, but is contrary to the great weight of authority. Indeed we have not found any case that goes so far in an effort to promote trusts and encourage monopolies; the true and prevaliing doctrine on this case being well expressed by the Michigan Supreme Court in *Richardson vs. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102, where it is said: 'Monopolies in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise, or public work under governmental control, in the interest of

the public. Its tendency is, however, destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the Federal Constitution, and is not allowed to exist under express provision in several of our state Constitutions. * * * It is always destructive of individual rights, and of that free competition which is the life of business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred upon corporations or individuals, and therefore public policy is, and ought to be, as well as public sentiment against it.' And by our Court in *Anderson vs. Jett*, 89 Ky. 375, 6 L. R. A. 390, 12 S. W. 670, where it is said: 'Rivalry is the life of trade; the thrift and welfare of the people depend upon it; monopoly is opposed to it all along the line; the accumulation of wealth out of the brow-sweat of honest toilers by means of combinations is opposed to competing trade and enterprise. That public policy that encourages fair dealing, honest thrift, and enterprise, among all the citizens of the commonwealth, and is opposed to monopolies and combinations because unfriendly to such fair dealing, thrift, and enterprise, declares all combinations whose object is to de-

stroy or impede free competition between the several lines of business engaged in utterly void.' "

The prinicple we contend for is well illustrated in the case of *Harding vs. American Glucose Co.*, 182 Ill. 551, 74 Am. State Reports, 189. The facts in that case were, that a corporation was formed for the purpose of taking over all of the corporations engaged in the manufacture of glucose and grape sugar. Harding, a stockholder of the American Glucose Company brought suit in Illinois enjoining the American Glucose Company from selling to the new corporation. The Court granted the relief prayed for, enjoined the sale, and among other things said:

> "The material consideration in the case of such combinations is, as a general thing, not that prices are raised, but that it rests in the power and discretion of the trust or corporation taking all the plants of the several corporations to raise prices at any time, if it sees fit to do so.
>
> "It does not relieve the trust of its objectionable features that it may reduce the price of the articles which it manufactures, because such reduction may be brought about for the express purpose of crushing out some competitor or competitors."

In the note to the last cited case in the Am. State Reports the author on page 243 uses the following

language concerning the case of *Carter-Crume Co. vs. Peurrung*, 86 Federal, 439:

> "But if each independent producer contracts to sell his product, or to sell or lease his plant, without concert with others, or knowledge of or purpose to participate in the plans of the buyer, he cannot be said to have conspired against freedom of commerce, or to have made a contract in illegal restraint of trade."

He further says:

> "The case of *Trenton Potteries Co. vs. Oliphant* (N. J.) 43 Atl. Rep. 723, if in harmony with American authority, must be sustained on this ground, if at all. The case, as first reported in 56 N. J. Eq. 680, 39 Atl. 923, is more in line with the general trend of courts' decisions relative to trade combinations and trusts, and seems to be the better decision."

The same author says on page 241, in reference to the case of *Oakdale Manufacturing Co. vs. Garst*, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784, and referred to on page 65 of appellant's brief as follows:

> "The mere consolidation of firms for the purpose of reducing competition between them is not illegal; *Oakdale Mfgr. Co. vs. Garst*, supra. * * * But this rule should not be carried to such an extent as to require the courts to assume to say how much competition is de-

sirable, as has been attempted in some cases. * * *

The only safe rule is that which we have already stated, viz., whether the purpose and natural consequence of the agreement tends to create a monopoly. * * * "

As to the case of *Central Shade Roller Co. vs. Cushman*, 143 Mass. 353, cited in appellant's brief at page 68, the same author on page 246 says:

"In the opinion of the Court the fact that articles manufactured, glue and roller shades, were not necessaries of life, was of considerable, if not controlling importance."

And on page 261, the author says:

"The nearest approach to a case holding a combination of patent owners to be valid is *Central Shade Roller Company vs. Cushman*, 143 Mass. 353, which we have had occasion to cite elsewhere. *National Harrow Co. vs. Hench*, 76 Fed. 667, is a well considered case holding such a combination illegal."

As was said by the Honorable Judge of the Lower Court, the question of whether an article is useful or necessary is eliminated, but monopolies in any commodity, whether useful and necessary or not, are prohibited.

The Trenton Potteries case is opposed to the prinicples as announced by Judge Taft in the

*Addyston Pipe Case*, 85 Fed. 271,wherein on page 291 he uses the following language:

"But in recent years, even the fact that the contract is one for the sale of property or of business and goodwill, or for the making of a partnership or a corporation, has not saved it from invalidity if it could be shown that it was only part of a plan to acquire all the property used in a business by one management with a view to establishing a monopoly. Such cases go a step further than those already considered. In them the actual intent to monopolize must appear. It is not deemed enough that the mere tendency of the provisions of the contract should be to restrain competition. In such cases the restraint of competition ceases to be ancillary, and becomes the main purpose of the contract, and the transfer of property and goodwill, or the partnership agreement, is merely ancillary and subordinate to that purpose. The prinicpal cases of this class are *Richardson vs. Buhl*, 77 Mich. 632; 43 N. W. 1102; *Arnot vs. Coal Co.*, 68 N. Y. 558; *People vs. Milk Exchange*, 145 N. Y. 267, 39 N. E. 1062; *People vs. Refining Co.*, 54 Hunn. 366, 7 N. Y. Supp. 406; *State vs. Nebraska Distilling Co.*, 29 Neb. 700, 46 N. W. 155; *State vs. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279; *Manufacturing Co. vs. Klotz*, 44 Fed. 721; *Distilling & Cattle Feeding Company vs.*

*People*, 156 Ill. 448, 41 N. E. 188; *Carbon Co. vs. McMillan*, 119 N. Y. 46, 23 N. E. 530; *Harrow Co. vs. Hench*, 83 Fed. 36; *Factor Co. vs. Adler*, 90 Cal. 110, 27 Pac. 36; *Lumber Co. vs. Hayes*, 76 Cal. 387, 18 Pac. 391."

It will be noticed that Judge Taft cites above the case of *Richardson vs. Buhl*, 77 Mich. 632, 43 N. W. 1102, and in referring to that case the Supreme Court of Kentucky in the *Rohrman Case*, 30 L. R. A. (N. S.) 981, uses the following language:

> "The true and prevailing doctrine on this subject being well expressed by the Michigan Supreme Court in *Richardson vs. Buht.*"

See also *Lufkin Rule Co. vs. Fringeli*. 57 Ohio St. 596, 49 N. E. 1030; 41 L. R. A. 185.

*Anderson vs. Shawnee Compress Co.*, 17 Okla. 231; 87 Pac. 315; 15 L. R. A. (N. S.), 846 and Note.

Affirmed by the Supreme Court of the U. S. in 209 U. S. 423 (52 L. Ed. 865) and Note.

The Shawnee Compress case is a decision of the Supreme Court of the United States directly in conflict with the Trenton Potteries Case, and we believe that the Shawnee Compress Case will govern in the case at bar, particularly when we take into consideration

the fact that the policy of the State of Washington in regard to monopolies is directly opposed to the holding in the Potteries case.

The case of *Metcalf vs. American School Furniture* Co., 122 Fed. 115, is cited by plaintiff in its brief on page 21 as supporting their contention. The decision in that case is based largely upon the decision in the Trenton Potteries Case, and must fall with it.

This case, however, can be distinguished both from the case at bar and the Trenton Potteries case. The Court uses on page 122 of the opinion the following language:

> "Great stress is laid upon the point that the transfer of the goodwill and plant of the Buffalo Company is entirely separate and independent of any intention by the directors of the American Company to create a monopoly in restraint of trade. Careful consideration of the question here involved constrains me, though with hesitation, to accept this view of the transaction charged in the bill."

In both the Trenton Potteries case and the case at bar all the parties knew of the purpose of the different transactions, that is, knew that it was for the purpose of monopolizing the business, and participated in all of the transactions which went to the forming of the monopoly.

The case of *Davis vs. Booth*, 131 Fed. 31, is also

cited by appellants as sustaining their contention. In that case the Court held that the stipulation not to go into business was valid, if it goes no farther than to support and protect the interests transferred by the contract of sale, and quote with approval Judge Taft's decision in the Addyston Pipe case.

The Court on page 38 of the opinion uses the following words:

> "But referring again to the distinction already alluded to between an aggregation effected by purchase, and a combination of several owners to pool their business and eliminate competition, it is to be observed that in the present instance it appears that the purchase price paid to the Davis Fresh and Salt Fish Company consisted partly of cash and partly of stock in the corporation of A. Booth & Co., and that therefore the transaction was of a mixed character. This is an aspect of the case which has given us most concern, and in respect of which we are not aware of any decision precisely in point. We are unwilling to decide a matter of so much importance at this preliminary stage of the case, and especially so because no particular attention has been given to it in the briefs and argument of counsel. We purpose, therefore, to give such directions in regard to the continuance of the injunction as will preserve the rights of parties

from serious impairment in the interim, and reserve this and another question reserved in another part of this opinion until final hearing."

As we have before shown the Addyston Pipe case lays down the principle that where a contract even though ancillary to some lawful act is one of a series of transactions, which have for their purpose the restraint of trade, or competition, or the monopolizing of business, or where the necessary result of such transaction will accomplish this, or tend to accomplish this purpose, is void as against public policy.

Appellants also cite in support of their contention the case of *Camors-McConnell Co. vs. McConnell*, 140 Fed. 412. The decision of the Circuit Court in this case was reversed by the Circuit Court of Appeals, in *McConnell vs. Camors-McConnell Co.* 152 Fed. 321, in which it was held that the contract in question was illegal.

In *Standard Furniture Co. vs. Van Alstine*, 22 Wash. 670, the vendor of furniture to be used in a house of prostitution gave a conditional sale, retained title and possession of the property used for the illegal purposes, and to that extent aided and participated in the conduct of the illegal business in which the purchaser was engaged, and the contract of sale there was held void.

So in the present case Smith and Willoughby aided and assisted in the formation of the monopoly,

and participated in it both by retaining joint possession of the T. I. & I. Company of Tacoma's plant, and also by boxing and shipping away the plant and retaining joint possession of it in Portland, Oregon, thus keeping it out of competition with the Commonwealth people.

*Dougherty vs. Rice*, 184 Fed. 878, cited by appellant, does not sustain appellant's contention, because the Court in that case held that if it should appear upon the trial that the transactions would tend to create a monopoly the Court would mould its decree to prevent the evil suggested.

The other cases cited by appellant do not sustain its contention, because none of the parties had anything to do with the illegal business itself; had simply knowledge of it, but in the case at bar Smith and Willoughby, the real plaintiffs, aided, participated, knew of and helped organize and carry on the monopolizing in the abstract business.

Contrary to the repeated statements of counsel for appellant in their brief that the holding of the Lower Court is opposed to the policy of the laws of the State of Washington concerning trusts, monopolies, contracts in restraint of trade and competition, we submit that the decisions of the Lower Court in this case follows strictly the policy of the commonwealth of Washington concerning these matters. Indeed, the Courts of the State are so jealous in protecting the rights of the people against

illegal contracts that in *Lewer vs. Cornelius*, 72 Wash. 124, it said:

> "Under Rem. & Bal. Code, Sec. 6282, making it unlawful for a brewing company to pay, advance or loan or become surety for the payment of a retail liquor license, a promissory note by the retailer, payable to a bank, and delivered to a brewing company, which solicited from the bank a loan thereon to pay the retaailer's license fee, is void as against public policy and unenforceable, where the bank had notice of the purpose of the loan and made the same on the security of the brewing company with a view of assisting in the evasion of the statute.
>
> The courts will refuse to enforce a contract entered into in violation of a statute and against public policy, without regard to the manner in which the illegality is disclosed, and will start an inquiry of its own regardless of the technical accuracy of the pleadings or the admissibility of evidence disclosing the illegality, to the end that neither party be given any aid in illegal proceedings."

We respectfully submit that the argument and authorities cited by appellant do not meet the situation framed by all the parties here in the transactions of 1909 and 1911.

There is no question but that if one sells his business to another he may legally contract not to en-

gage in business for a limited period, and within a limited territory. That is all that is held in the case of *Washington Charcrete Company vs. Campbell*, 72 Wash. 566, quoted on page 24 of plaintiff's brief, but as was said by Judge Taft in the Addyston Pipe Case, a contract of this kind will not be upheld when it is one of a series of transactions, which have for their purpose the restraint of trade or competition, or the monopolizing of business, or where the necessary result of such transaction will accomplish or tend to accomplish this purpose, and no authority has, or can be cited that does uphold a contract burdened with the latter results.

Appellant also cites the case of *Oregon Steam Navigation Co. vs. Winsor*, 20 Wallace 64, 22 L. Ed. 315. The Supreme Court of the United States in that case held:

> "An agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it is not unreasonable, and there is a consideration to support it."
>
> An agreement that a steamer should not be used in the waters of a State for a fixed period, held legal."

The facts in that case were that the California Steam Navigation Company sold to the plaintiff, being a company engaged in like business on the Columbia river, the steamer New World, for Seventy-five Thousand Dollars, and as a part of the

purchase and sale the plaintiff stipulated that he would not run or employ, or suffer to be run, or employed, the steamer upon any of the routes of travel, rivers, bays or waters of the State of California, for the period of ten years from the first day of May, 1864; that on the 18th day of February, 1867, the plaintiff sold the same steamer to certain of the defendants, for the sum of Seventy-five Thousand Dollars, subject to a stipulation and covenant that the said steamer should not run or be employed upon any of the routes of travel, or the rivers, bays or waters of the State of California or the Columbia River, for a period of ten years from the first day of May, 1867. The Court held that the agreement made at the time of the first sale to refrain from operating the boat was legal, and a good consideration for it, but that the second agreement, being for three years longer than the first agreement, was void as to three years, as being without consideration.

In *Grenada Lumber Co. vs. Mississippi*, 217 U. S. 433 (54 L. Ed. 826), the defense was that the parties did not intend to restrain trade or competition by their contract, but the Court held:

> "That such an agreement is in restraint of trade, is undeniable, whatever the motive or necessity which so induced the compact."

Appellant's contention that the transaction of 1911 was simply a rearrangement of the securities is, under the evidence in this case, absolutely with-

out foundation. Appellant says in its brief, page 40, that there was some kind of an arrangement in 1909 by which the Smith and Willoughby interests were not to enter into the abstract business. That, together with the transactions which took place then, as hereinbefore recited, made a monopoly of the abstract business in Pierce County. Then in 1911, as a part of the transactions between the Smith and Willoughby interests and the Commonwealth Company and the T. I. & I. Company of Tacoma, we find Smith and Willoughby making a written agreement not to enter into the abstract business in Pierce County. The appellant contends that this was not part of the transaction of 1911, but was an afterthought and executed afterward, but the Lower Court in its findings (Record, p. 161-162), finds that it was part and parcel of those transactions and contemplated by the parties, and was so understood by them. How could the execution of this agreement be a part of the readjustment of their indebtedness and security? The entering into that agreement by Smith and Willoughby, the boxing up and sending the abstract plant to Portland, and removing it from competition, and removing the danger of it coming in competition, all of which was participated in, aided and abetted by Smith and Willoughby, can only be construed as being a part and parcel of further solidifying the monopoly in the abstract business in Pierce County already existing.

## RULE OF REASON.

Appellant invokes the "rule of reason" doctrine to sustain its position. On page 43 counsel for appellant cite the case of *National Enameling Co. vs. Haberman*, 120 Federal 415, as being decided on the "rule of reason" theory. We submit that appellant can get little consolation out of that case, for it simply holds:

> "A restrictive covenant, made by one capable of contracting, which is unlimited as to time, in area covers the entire United States, is ancillary to the main lawful contract (being in part consideration of the payment for good-will sold), and is reasonable and no broader than is necessary to save to the covenantee the rights and privileges for which he has paid, may be enforced."

The appellant on page 43 also cites 9 Cyc. 529, as a good expression of the "rule of reason" theory. Apply the rule as expressed in Cyc. to the evidence in the case at bar, and no recovery can be had.

Again on page 61 of its brief appellant cites the case of *Fisher Flouring Co. vs. Swanson*, 76 Washington 649, as sustaining this "rule of reason," but we maintain that that case sustains our position. We have referred to this case before in our brief, but feel constrained, on account of the reliance upon it by appellant, to quote from the opinion in that case (Op. p. 654)

"And again when the contract fixing the price is not ancillary to some main lawful contract, the sole object of the contract is to restrain competition and enhance prices, and its only tendency is to control the market. It is therefore invalid because of this tendency, without reference to its reasonableness in other particulars. In such a case, there is no main lawful purpose to subserve which partial restraint is permissible, hence nothing by which to measure the reasonableness of the restraint. Its only measurable tendency would be to create a monopoly. Such a contract is therefore invalid. *United States vs. Addyston Pipe & Steel Co.*, 85 Fed. 271; *State vs. Duluth Board of Trade*, 107 Minn. 506, 121 N. W. 395, 23 L. R. A. (N. S.) 1260."

Then again on page 656:

"The foregoing authorities make it clear that the courts now generally recognize, as the basis of the rule of public policy against restraints on competition, the tendency to create a monopoly. It is manifest that a restriction of competition between the owners of an insignificant part of the entire supply of a given commodity in a given community could not create a monopoly nor injuriously affect the public. It is equally clear that the restriction need not be a complete restriction covering the entire supply of a given commodity in order

to injuriously affect the public, but, unless it be held that every restriction is *per se* illegal, where are we to draw the line? Obviously, the answer must be found in the facts of each particular case. If, considering all of the circumstances, including the character of the business, the necessities of the parties, the existence of other contracts, if any, of the same character, the restriction results or tends to result in a substantial control of the supply or price of a given commodity within a given area by a single dealer or a few dealers, or by what amounts to a combination of all of the dealers, the contract is invalid. Substantial control of a market by one or a few is, of course, as injurious to the public as an absolute control. Wherever, therefore, there exists a monopoly or combination, or the contract creates or tends to create a monopoly or such approximation to monopoly as to practically bar others from entering the field by the chance of failure, a contract fixing retail prices is void as essentially injurious to the public."

Appellant maintains that the rule in the Fisher Flouring case is substantially as follows:

"Contracts incidental to some main contract, not proceeding from or tending to create and maintain a monopoly, will be maintained when the restriction is, under the circumstances of

the particular case, reasonable in reference to the interests of the parties and of the public."
(Appellant's brief, p. 61).

Applying this rule to the case at bar no recovery could be had.

The opinion in the case of *Gross, Kelly & Co. vs. Bibo*, 145 Pacific 480, cited supra, settles the contention, it seems to us, that the "rule of reason" theory will not aid appellant any in this action.

In that case, on page 491 of the opinion, the Court uses the following language:

> "If the 'rule of reason' be applied to this contract, it will not help appellant. Under this doctrine, which was firmly established by the Standard Oil Case, contracts in restraint of trade which are unreasonable are invalid. While originally, at common law, all contracts in restraint of trade were presumptively invalid (*Mitchel vs. Reynolds*, 1 P. Wms. 181), because such contracts were deemed injurious to the public as well as to the individuals who made them, 'in the interest of the freedom of inidviduals to contract this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminous with the kingdom that it was treated as void; that is to say, if the restraint was partial in its operation, and was otherwise reasonable, the contract was held to be valid.' *Standard Oil*

*Co. vs. U. S.*, supra. It is the purpose of the contract which makes it reasonable or unreasonable, coupled, of course, with the limitations put upon the right to engage in business. If the restrictions are no broader than are necessary to protect the party in the enjoyment of the benefits of the main contract, to which the restraint is incidental, the contract would be upheld as valid, because reasonable. On the other hand, if the restrictions are so broad that it necessarily appears that the restraint is unreasonable, the contract would be held to be illegal."

The Lower Court recognized the principles contended for by appellees, and on this branch of the case in his opinion uses the following language:

"When the Commonwealth Company came into these transactions the business of the T. I. & I. Company of Tacoma was in a failing condition, the only consideration to the Commonwealth Company being that it gave it a monopoly by excluding both the T. I. & I. Company of Tacoma, and the T. I. & I. Company of Washington, as well as Smith and Willoughby from the abstract business in Pierce County. In so far as Smith and Willoughby were concerned, they were not therefore expressly excluded from competing with the Commonwealth Company. If it be conceded that the agreements not to compete were, so

far as the T. I. & I. Company was concerned, incidental to the sale, it cannot be so considered when regarding them as transactions with the Commonwealth Company, because that which one company—the T. I. & I. Company got—the other company—the Commonwealth Company—did not get. It by no means follows that because such an arrangement would be considered a lawful incident to the sale of a profitable business, that it would be so considered in the case of a sale of a business which all recognized as running at a loss. In the first instance, the law in its indulgence, would attribute only lawful motives, unless compelled to do otherwise, but under the latter circumstances, reason cannot but reject the contention. The foundation of the exception to the rule against any restraint of trade and commerce is that the law never presumes wrong to be done, or a wrongful purpose; that a wrongful purpose and an act to effect such purposes are necessary to defeat a contract between competent parties; that as long as acts are only such as are reasonably necessary to effect a sale of property, an unlawful purpose will not be imputed, although the effect is, in respect to competition, injurious, but the purpose will be presumed to be merely the disposing of his property by the owner, a right of the highest character, not to be lightly impeded. But, if the seller actually

enters into the machinations of the buyer, outside of what is reasonably necessary to the sale of his own, and assists thereby in the stifling of competition or in forming a monopoly, a purpose to injure the public will be attributed to the seller in spite of his right to sell that which is his own.

What incentive or motive was there to buy a business that was running behind, and lock its plant up for 36 years, if it were not to eliminate all competition. If it cannot be fairly said that the obligee's purpose was to buy, how, without a paradox, can it be said, when they were acting in full accord, that the promisor's purpose was to sell. Under the circumstances it could not be said that the goodwill of the business of the T. I. & I. Company of Tacoma was preserved and passed to the Commonwealth Company, because there was no merger in any way of the business of the two companies. They had been kept entirely separate so far as the public was concerned until this arrangement was made, when the former company abruptly terminated its activities, and, so far as the goodwill of its business was concerned, it was simply cast adrift.

Under the contract of 1909, possession was immediately taken of the plant by the buyer, subject to partial control on the part of the seller, and competition for the future was eliminated, but under the agreement of 1911,

competition was entirely annihilated, and the delivery of possession of the property postponed for 36 years. The limited span of man's life cannot help but affect his interest and purpose in all his actions. The immediate is of more consequence to him than the remote. Under the first contract it might be plausibly contended that the main purpose was to sell, and that the elimination of competition was incident to the sale, but under the latter transaction it is clear, that, the sale of the property, the transfer of possession, being deferred for thirty-six years, two generations, the main, well nigh the entire purpose, was the elimination of competition, and the transfer of the property was merely incidental. Beyond his grandchildren a man is not hardly conecrned for making provision for his descendants. It is contended that this was merely a sale, and that while the seller might have knowledge of defendant's purpose to form a monopoly, yet it was in no sense the seller's purpose, and that if the seller's act tended to assist in the buyer's purpose, yet it was only such assistance as was necessarily incident to the making of the sale of its property, which it had a right to do. This contention would be more plausible were it not for the fact that, simultaneously with the sale, Mr. Willoughby, manager of the T. I. & I. Company of Washington, assisted the buyers in securing con-

trol, by a five-year lease and option to purchase, of the only other competing company, the Wilson Company, by the terms of which the lessor was to remain in possession, that is, its plant was not to be operated, that is for a monthly rental which was paid to keep it out of business. By assisting in this transaction, the seller departed from what was reasonably necessary in making a sale of its property, and knowingly assisted the buyer in its purpose to effect a monopoly.

It is true that the services of Willoughby in securing the Wilson lease, was no part of the express consideration for the mortgage of 1909. In this sense it is a collateral matter, but in view of all the evidence it is clear that it was all a part of one transaction, and that it was well understood that complete control, that is, monopoly, of the abstract business was to be acquired by securing both the independent plants, with the incidental power to fix and control prices and output. *U. S. vs. Addyston Pipe & Steel Company*, 85 Fed. 271.

This is considered sufficient to render the 1909 contract invalid, without considering the effect of the control in the buying corporation retained by the seller, nor the extent of the latter's interest therein, having a $90,000.00 mortgage on property sold for $100,000.00 to a corporation with a $5,000.00 capital stock,

upon the interest of the seller, or its responsibility for conduct of the buying corporation.

It may be said that it was reasonable for Smith and Willoughby, and the selling corporation, to contract not to re-enter the abstract business in Pierce County as a part of the sale. If skilled in their calling all the rest of the world remained open to them, and the public would not be likely to suffer from their enforced idleness, but the locking up, for 36 years, of the valuable abstract plant and the abstract books of the T. I. & I. Company of Tacoma, whose only possible use was in the abstract business in Pierce County, deprives the country of a valuable industrial agency in which the public has an undoubted interest. This qualification is recognized by the Supreme Court in *Oregon Steam Navigation Company vs. Winsor*, 87 U. S. 64.

In case of bad market conditions, the closing, by agreement, of a plant for a limited time, that is, such time as such conditions might reasonably be expected to continue, might not be unlawful, but 36 years is far in excess of any such reasonable time. In *Olin vs. Gilmore*, 25 Fed. 562, where the agreed term was five years and the articles not to be manufactured were two kinds of hinges, the agreement was held to be invalid.

Prior to the agreement of December, 1911,

in July of that year, one of the Foggs wrote to Willoughby in part as follows:

'The abstract business is now so poor that some new plan must be made, as there is not enough business to even pay the running expenses of the two plants, and in addition to that, the new man is coming into active competition and must be headed off before he has a chance to build up a good plant. If you will give us your share of help, we will still try to pull the thing out O. K., as almost any revenue derived will be more than could be had by figthing him and each other too. After considering a good many palns, this one seems to be the best.

That is, to increase the capital stock of our company to four hundred thousand dollars, give you $80,000 and Wilson $38,000, preferred stock at 5 per cent., in exchange for your plants, then operate only our plant, and as soon as the amount of work increases any, to cut the rate to seventy-five cents, and later to fifty cents, if necessary to keep a clear field. This plant could easily do several times the total abstract business to be done, and we would make more money for us all by operating one plant at reduced rates, than to keep the rates up and let the new man build up a plant out of his profits, and I am sure that low abstract rates will keep out competition better than several com-

panies at higher rates would do. At a dollar, the new man would make a little profit on each order, but at seventy-five cents he would lose a little on each order, and no one outside of ourselves can make abstracts at less than a dollar and make a cent profit. We could do it because our plant is so complete and we have such a large amount of stock on hand.'

While the proposition made in this letter was not accomplished in its entirety, it was not rejected on account of the proposition to crush the new competitor by cutting prices. In fact a little later Mr. Willoughby writes Mr. Fogg as follows:

'Your letter of August Third relative to the abstract situation at Tacoma has been received.

We understand the condition of the abstract business in Tacoma and are ready to give our assistance to any proposition that will relieve the situation, provided our interests are fully protected. Would rather take the plant back and operate it than to go into a proposition where by we would be a minority stockholder and therefore have nothing to say in the management of the company.'

Later in December the arrangement now in question in this suit, was made. It relieved the defendants of the expense of maintaining two abstract companies, and left them free to

suppress this new competitor, as so frankly proposed by Mr. Fogg in his letter to Mr. Willoughby. Although the cutting of prices generally would be of benefit to the public, yet cut-throat competition such as that proposed, and evidently acceded to, for its own benefit, by the plaintiff, the object of which was to eliminate a competitor by selling without regard to a fair profit, for the sole and express purpose of crushing him, to recoup later from the public, is itself unfair competition. *People vs. Dwyer*, 145 N. Y. Supp. 748, affirmed 150 N. Y. App. Div., 542, further affirmed 215 N. Y. 48; *U. S. vs. Great Lakes Towing Company*, 217 Fed. 656, 659, 661; Report of Comm. of Corp., March, 1915—see Trust Laws and Unfair Competition, p. 305, et seq., 463 et seq., 479 et seq.

For all of the foregoing reasons it is considered that both the contract of 1909, and those of 1911, are invalid as being unduly and unreasonably in restraint of trade and competition.

If, as has been held under the Sherman Anti-Trust Law, there may be lawfully a reasonable restraint of trade and commerce, the converse would appear to be that such right carried with it a corelated duty that such restraint should not be unreasonably unrestrained. Such, it is considered, would be a campaign of price cutting such as impliedly

agreed to herein, for such would be well calculated in itself, in the end, to unduly restrain trade by driving the men of lesser financial resources, though of equal skill and efficiency, from the field, and, through fear, keeping them from entering it.

Having reached this conclusion, it follows, the pledge of the abstract plant becomes incident to the notes now held to be invalid. The pledge is therefore likewise held to be invalid."

(Opinion, Record pp. 173-174-175-176-177-178-179-180.)

## FIFTH.

It must be apparent to any unprejudiced mind, after reading the record in this case that the opinion of the lower court, and the judgment based thereon, declaring all the contracts of 1909 and 1911 void and unenforceable as being in restraint of trade and competition, tending to form a monopoly, and as being within the inhibition of the constitutional provisions of the State of Washington above cited, must be affirmed, and that it would be an imposition upon the time of this honorable Court to refer at any length.

1. To the partial defense of the T. I. & I. Company that this action was prematurely brought, and,

2. To the partial defense of the Commonwealth Company, found on page 48 of the Record, that

the provision in the agreement executed by the Commonwealth Company, as set forth on said page 48, and the demand of plaintiff thereunder are unconscionable and inequitable, and in the nature of a penalty, and not enforceable in a court of equity.

I.

In regard to the defense of the T. I. & I. Company of Tacoma that the action was prematurely brought, we will simply say that the mortgage of the T. I. & I. Company of Tacoma provides that no action should be commenced thereon until the T. I. & I. Company of Tacoma has been in default in the payment of any installment of principal for one year, and not then until ninety days' notice of such default had been given to the T. I. & I. Company, after the expiration of said one year. An installment of principal of was due December 2, 1915, and would be in default December 2, 1916, so that no action could be maintained on the notes or mortgage of the T. I. & I. Company of Tacoma until ninety days after December 2nd, 1916; this action was commenced February 8th, 1916, seeking a foreclosure of the mortgage or pledge, attached to the complaint marked "Exhibit A," and such action could not have been commenced, under the terms of the mortgage, until March 2nd, 1916.

Appellant attempts to avoid this contention by claiming that the inconsistency between the notes

and mortgage were the fault of the scrivener. The Lower Court in passing upon this, we think, effectually settled this proposition in favor of the contention of appellees.

(See Opinion, Record, pp. 168-169-170-171.)

II.

Under the authority of *Cissna Loan Company vs. Gawley*, 87 Washington 438, and other Washington cases, and *Chicago House Wrecking vs. United States*, 106 Federal 389; *Pomeroy Equity Jurisprudence*, Vol. 1, Sec. 441, et seq.; 13 Cyc. 101; *Parsons on Contracts*, 9 Ed., Vol. 3, p. 174, the contention of appellees, as set forth in the answer of Commonwealth Company above referred to, is that the interest provided for in said contract not yet due is in the nature of a penalty, in that it demands the payment of a larger sum of money for the mere failure of payment of a smaller sum, and cannot be recovered. Many other cases can be cited to the same effect, but as before stated, we are so confident that the judgment and decree of the Lower Court must be affirmed, that we do not believe this Court will ever arrive at the point of considering these partial defenses.

## CONCLUSION.

Counsel for appellees realize the fact that they have given the issues involved in this case a very extended discussion, but have felt that the import-

ance of the case would excuse them if this Honorable Court should feel as if they have trespassed upon the time and attention of the Court in this regard.

We submit that counsel for appellant in their brief have attempted to evade the well known principles regarding contracts in restraint of trade and competition, and the well known principle regarding monopolies, but have wholly failed to advance any argument or authority sufficient to entitle appellant to any relief.

We earnestly contend that taking all the transactions from 1909 down to 1911, that it was the dominant purpose of all the parties interested to form a monopoly of the abstract business in Pierce County; that Smith and Willoughby assisted in forming the same, participated in it, and were benefitted by it; that all of the contracts entered into were entered into in furtherance of this idea. That all of the contracts are void as against public policy, being in restraint of trade and competition, and tended to form a monopoly. That the contract of guaranty of the Comomnwealth Company is void for the same reason, and is furthermore void as being prohibited by the constitutional provisiions above referred to. That the individual contracts of guaranty cannot be maintained, because of the illegality with which the principal contract is tainted, which taint follows and attaches to the individual contracts of guaranty.

Appellant's counsel in the trial of the case introduced evidence tending to show that the Fogg and Gove interests subsequent to December 2nd, 1911, did not succeed in maintaining a complete monopoly. We objected to the introduction of the evidence at that time as being immaterial and irrelevant, and we respectfully submit that this objection should have been sustained, because all of the authorities hold that if the transactions tended to produce a monopoly, and the transactions were entered into for the purpose of producing a monopoly, it is immaterial whether subsequently they succeeded in maintaining that monopoly. It is immaterial whether the output was reduced; whether the prices were raised. If the power was given to the monopoly to do this thing the evil was accomplished.

Appellant in its brief on page 22, uses the following language:

> "It is a curious principle of law which permits monopolists whose plans have gone astray, to avoid the obligation of their contracts by pleading their unlawful designs. Particularly is this so when the anticipated plunder would have been theirs alone."

What are the facts in regard to the plunder? The decree of the lower court awarded to appellant the abstract plant, which was boxed up in Portland, enhanced in value as it had been by a valuable set of records donated to it by the Commonwealth

Company, and, in addition, according to the undisputed testimony of Mr. Fogg (Record, p. 131), Smith and Willoughby had received Forty-two Thousand Dollars in cash.

Curious as this principle of law may seen to appellant, as was said in *Davis vs. Southern Pacific Co.*, 235 Federal 731, the Court will leave the parties where it finds them, and is compelled in obedience to the positive mandate of the law to send plaintiffs forth the victims of their own indiscretion and indulgence. To adjudge appellant entitled to recover would enforce a contract which the Court holds unlawful and unenforceable.

The rules in regard to participating in the formation of a monopoly in the State of Washington are set forth in the authorities cited in this brief, and he who seeks to deviate therefrom does so at his own risk, and cannot expect the courts to recoup him any loss he may sustain thereby, or to grant him any relief.

The defenses interposed by the appellees have been criticized at times, and in one case referred to as dishonest defenses. *McMullin vs. Hoffman,* 175 U. S. 639, 654 and 669. It was for the purpose of showing fully to the Court the attitude of the appellees in this case, and the attitude of the appellees during all the time covered by the various transactions, the appellees while being advised by counsel that these agreements were all illegal and

could not be recovered under, still, for the purpose of playing fair, offered the appellant, as shown by the testimony, liberal concessions, but the appellant refused all of these offers, and demanded "its pound of flesh," and the appellees feel that now they are justified in standing upon the strict letter of the law, and have no hesitancy in setting up and asserting the illegality and non-enforceability of all of said mortgages, pledge, agreements and other arrangements.

There is no reason why the rules of law above cited should not be applied in the case at bar. The real plaintiffs in this action, Willoughby and Smith, were original parties to all the transactions, and the various agreements were made with the common intent on the part of the several plaintiffs and defendants to protect their individual interests in the two abstract plants in Tacoma. Appellants have received upwards of Forty-two Thousand Dollars in cash on the various contracts. This was more than the law would give. The cases all hold that the court will not enforce the agreements, but will leave the parties where it finds them.

This is exactly what the lower court did, and we respectfully submit that its judgment and decree should be affirmed.

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